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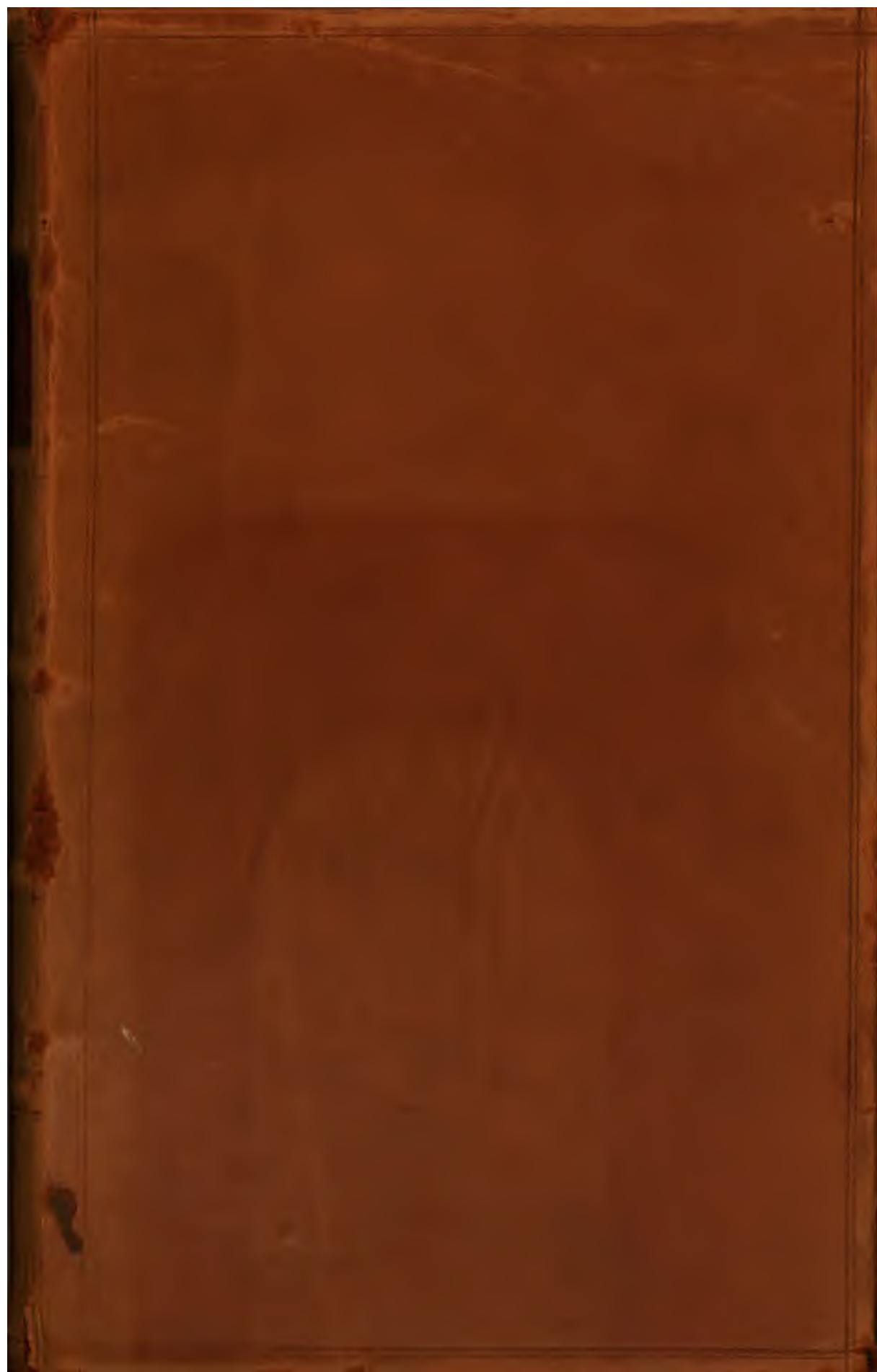
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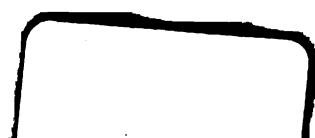
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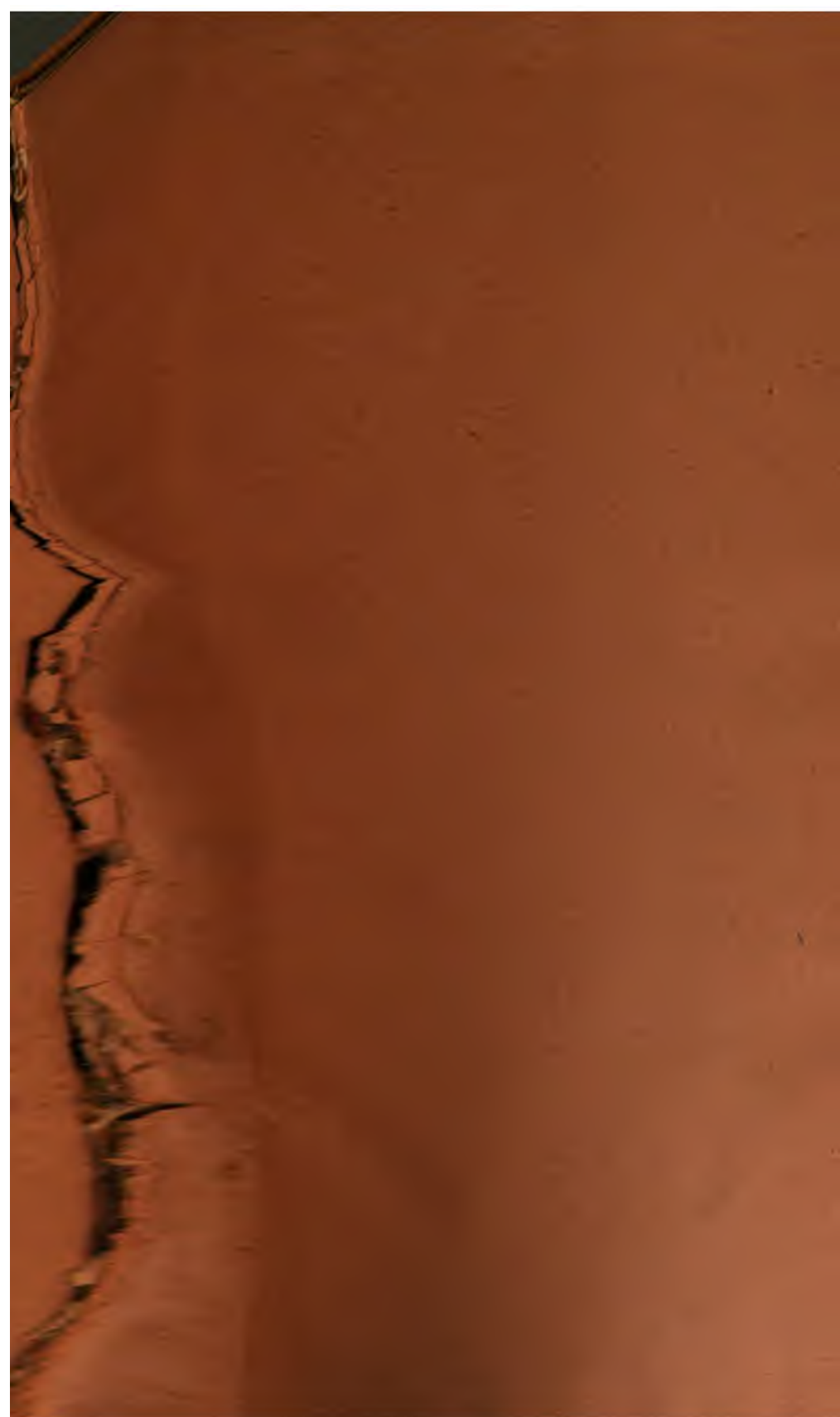
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1731-23055 ~~W. H. Miller~~
MODERN REPORTS;

OR,

Smith
S.ELECT CASES

ADJUDGED IN

THE COURTS

OF

**KING'S BENCH,
CHANCERY, COMMON PLEAS,
AND
EXCHEQUER,**

VOLUME THE TWELFTH;

BEING

A COLLECTION OF CASES adjudged in THE COURT OF KING'S BENCH,
from the SECOND Year of WILLIAM THE THIRD, to the END of HIS
Reign. By a late BARRISTER of the MIDDLE TEMPLE.

THE FIFTH EDITION,

CORRECTED:

WITH THE ADDITION OF MARGINAL REFERENCES AND NOTES.

By THOMAS LEACH, Esq.

OF THE MIDDLE TEMPLE, BARRISTER AT LAW.

L O N D O N;

PRINTED FOR G. G. AND J. ROBINSON; E. AND R. BROOKE;
J. BUTTERWORTH; OGILVY AND SPEARE; AND
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AS these Reports were taken during the time **LORD CHIEF JUSTICE HOLT** presided in the Court of **KING'S BENCH**, nothing need, nothing can be said to recommend them to the Public, but that they are a faithful collection of the decisions of difficult and important questions of law, in which that great man bore so great a part.

Many of the Cases are reported; many of them have been kept locked up in the private studies of gentlemen of the profession, possibly with a view to their own particular benefit and reputation. Those which have been reported, it is imagined, will receive some light from the same Cases here printed; as the whole chain of arguments, the objections and answers of the Counsel are faithfully preserved; by which the whole of the Case, and the reason on which the Judgments were founded, will clearly appear.

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103-23885 ~~W. A. Miller~~
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THE PREFACE.

The justice, wisdom, and unbiaſſed integrity of LORD CHIEF JUSTICE HOLT, thoſe who lived in his time were immediately ſenſible of; and to that juſtice and unſhaken integrity, and the univerſal ſuffrages of praiſe of a whole nation for ſuch a behaviour, we may poſſibly, in a great meaſure, be indebted for ſuch a ſeries of great men ſince his time, in the profeſſion of the law; not to be equalled in any former period of hiſtory, and not likely to be exceeded in future.

He has ſhewn us that real merit will make its own way without any aſſiſtance, without any little arts or aſſiduities; and that the only certain method to have a good reputation, is to deſerve it. Great and good men, who dare do right, without regard to the ſtrength of oppoſition, or the clamours of a multitude, are not only a bleſſing to the age in which they live, but to ſucceeding generations, by their being incentives to a ſimilar behaviour to poſterity.

Of this the preſent age are abundantly ſenſible, in having the ſeveral courts of judicature filled with perſons of the greateſt integrity and abilities; and ſedulouſly careful of the rights and liberties of the people; and in my judgment, HIS MAJESTY could not poſſibly have given more convincing proofs of a fixed and determined reſolution to preſerve the conſtitution and the liberties of the people inviolate, than his having appointed ſuch perſons to adminiſter juſtice, who would not, on any conſideration, either by hopes or fears, rewards or threats, be ſwerved from doing right.

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MICHAELMAS TERM,

The Second of William and Mary,

IN

The King and Queen's Bench.

Sir John Holt, Knt. Chief Justice.

Sir William Dolben, Knt.

Sir William Gregory, Knt.

Sir Giles Eyre, Knt.

} *Justices.*

Sir George Treby, Knt. Attorney General.

Sir John Somers, Knt. Solicitor General.

* [1]

* Woolbridge against Cloberry and Others.

Cafe 1.

ACTION for diverting a water-course from a mill against several, who joined in pleading *not guilty*. One of them died before verdict.

Where two defendants join in pleading, and one dies after the *venire facias*, it is error *in toto*.

PER CURIAM. It is error *in toto*; for when, after joinder in pleading, one of the defendants dies after the *venire facias*, you ought to come into court and pray judgment against the living only; otherwise the writ shall abate (a).

S. C. Carth.
149.
S. C. 3. Salk.
227.

(a) See statute 3. & 9. Will. 3. c. 11. Gilb. C. B. 195. Bull. N. P. 312.

Copley against Hepworth.

Cafe 2.

COVENANT to pay an annual rent of sixty pounds and to repair. The plaintiff says, that the defendant entered, but ~~did~~ not aver a lease made. The defendant pleads, that he ought not to have the rent, for that no lease was made.

Covenant and entry amount a lease.

HOLT, Chief Justice. In mutual covenants, where the performance of one depends upon the other, the precedent covenant must be performed first.

S. C. 3. Salk.
108.
See Thorpe v. Thorpe, 1. Salk.
171. ; Roe v. Ashburner, 5. Term Rep. 163.

VOL. XII.

B

EYRES

Michaelmas Term, 2. Will. & Mary, In B. R.

COPLEY
against
HEPWORD.

EYRE and DOLBEN, *Justices*. The covenant and entry amount to a lease; and so was the case of *Harrington v. Wife*.

HOLT, *Chief Justice*. It has been held *aliter* ever since. Judgment for the plaintiff (a).

* [2]

(a) See *Roe v. Ashburner*, 5. Term Rep. 163.

Case 3.

Cone against Bowles.

Replevin against three defendants, one of whom an infant, but all appeared by attorney; judgment was given against the plaintiff, who assigned this for error; but not assignable for error, because it might have been pleaded in abatement.

ERROR OF A JUDGMENT in replevin in the common pleas. The error assigned was, that three made * conuſance by attorney, and one of the avowants was an infant.

EYRE, *Justice*, for affirming judgment. This may be assigned for error, though pleadable in abatement (a). Where the writ is abateable generally, and the defendant pleads in bar, and judgment is against him, it is not assignable for error (b). An avowry is in the nature of a count (c). Avowry is abateable, as other declarations are; and here the avowants are plaintiffs; and though an infant cannot count by attorney, for he cannot make a warrant of attorney, yet as plaintiffs, and some of them of full age, they may sue by attorney; and the plaintiff of full age may make warrant of attorney for all.

S. C. Carth.

GREGORY, *Justice*, *concessit*.

122. 179.

S. C. 4. Mod. 7.

S. C. 1. Show.

13. 165.

S. C. Salk. 93.

205.

S. C. Comb. 100.

S. C. Holt, 358.

5. Com. Dig.

"Pleader"

(2. C. 1).

DOLBEN, *Justice*, *per quem*. Not error, because *in autre droit*; and admitting it had been error at common law, the statute of 21. *Jac.* 1. c. . would have helped this case; for notwithstanding that speaks of a *verdict*, and ours is a *nonſuit*, yet it is within the intent of it.

HOLT, *Chief Justice*. This is not assignable for error; though an infant acts *in autre droit*, yet damages shall be recovered *de bonis propriis*, if judgment be against him; and there is the same reason why he should have a guardian where the action is *in autre-droit* in this case, as in other cases, where infant is executor, and recovery is had against him (d). A release by infant executor is void (e). And being joined with others alters not the case; for no reason, if all the rest are beggars, they should conclude the infant. It differs from the case of executors, for they must all join in defence, being joined in the will; and the infant executor may disavow at full age, and not be concluded by recovery under age. But the reason why it is not pleadable for error is, because it is pleadable in abatement; and where the time is lapsed, there shall be no advantage in error (f). And *Cro. Jac.* 5. is no law; for at that time, the court of exchequer-chamber were grasping at errors in fact; and that was the reason of that resolution; but no error in fact is assignable there, but in this court only. 1. *Roll.* 783. no law.

The judgment was affirmed.

(a) *Cro. Jac.* 5.

(b) 1. *Roll.* 181. 288. *Cro. Eliz.* 378.

2. *Saund.* 212.

(c) *Co. Lit.* 392.

(d) See *Rusell's Case*, 5. *Co.* 27.

(e) *Cro. Jac.* 441.

(f) See *Case of Avowries*, 9. *Co.* 20.

The

The King *against* Lambert.

Case 4.

AMANDAMUS was awarded to reſtore *Dr. Lambert* to the office of archdeacon of *Salisbury*; and return, *quòd non fuit debitus electus*; and argued to be bad, becauſe a * negative pregnant, but it ought to be, *non fuit electus ut dicitur*. 1. *Sid.* 209, 210.

Return to a mandamus non fuit debitus electus good.
S. C. Carth. 170.

But *PER CURIAM*, Good; for the writ recites, *licet fuit debitus electus*, and the return is a direct answer; and ſo held at the end of the caſe reported by *Siderfin*.

Kemp *against* Andrews.

Case 5.

IN TROVER the plaintiff declares, that *N. J. S.* and himſelf were poſſeſſed, that the others died, and that the goods came to the defendant's hands, &c.

Jointenancy muſt be pleaded in abatement, and not in bar.

The defendant pleads, that they were joint merchants, and no ſurvivor by law amongſt them; and ſo prays the plaintiff, as to the joint goods, may be barred.

S. C. 3. Lev. 290.
S. C. 1. Show. 188.

Demurrer, and judgment for the plaintiff; for though no ſurvivor (*a*), yet the plaintiff had right to a purpart; and jointenancy ought to be pleaded in abatement, and not in bar.

S. C. Carth. 170.
S. C. 3. Salk. 1.
S. C. Holt, 545.
S. C. 1. Ray. 507.
1. Vent. 34.

Vide Lev. Ent. 19. 3. Lev. 191. *Vide* 1. Saund. 291.

(*a*) Co. Lit. 182. a.

Elliot *against* Danby.

Case 6.

AN ASSIGNMENT of a term of years was made by commiſſioners of bankruptcy to a creditor, who, before inrolment of the deed of assignment, made a leaſe to the defendant, and then the deed was inrolled.

Leaſe by commiſſioners of bankruptcy muſt be by deed inrolled.

PER CURIAM. Such a leſſee cannot maintain an ejection, becauſe the leaſe could not have been before the inrolment. The words of the ſtatute are, "that commiſſioners may ſell by deed inrolled;" ſo without inrolment no ſale (*a*).

(*a*) *Vide* tamen 2. Co. 26. a.—See alſo the caſe of *Perry v. Bowes*, T. Jones, 196. 1. Vent. 360.

Anonymous.

Case 7.

PER CURIAM. An action lies againſt a common carrier for reſuſing to carry money, if he do not aſſign a particular reaſon for it.

Carrier.

Hook *against* Galloway.

Case 8.

TROVER *de decem ponderibus*, ANGLICE "weights."

Trover de decem ponderibus, ANGLICE

PER CURIAM. In trover, if the jury can underſtand it, it will be well enough, for damages only are to be recovered therein; ſic in detinue, where the thing itſelf is to be recovered.

"weights," good; aliter in detinue.

E A S T E R T E R M,

The Third of William and Mary,

I N

The King and Queen's Bench.

Sir John Holt, Knt. Chief Justice.

Sir William Dolben, Knt.

Sir William Gregory, Knt.

Sir Giles Eyre, Knt.

} *Justices.*

Sir George Treby, Knt. Attorney General.

Sir John Somers, Knt. Solicitor General.

* [4]

Case 9.

* The King and Queen against Gilbert.

Leets by prescription may be held at different times, and need not shew by what authority.
IN many places, by prescription, leets are held at other times than within a month after *Easter* or *Michaelmas*.
In all leets they only say, "*ad cur. &c. tent.*" such a day, without shewing their authority. It had been a good objection not to shew authority, if constant practice had not been *aliter*.
S. C. 1. Salk. 200. 1. Salk. 40. 1. Lilly, 366. Cro. Car. 46.

Case 10.

Crofts against Harris.

Award without performance a good bar.
AN AWARD without performance is a good bar, but not an accord without satisfaction. At this day the submission of both parties is a mutual promise, whereupon an *indebitatus assumpsit* lies.
Carth. 187.

Case 11.

Temple against Killingworth.

Case lies for suing in a court which has no jurisdiction.
HOLT, *Chief Justice*. Of late it is held, that case will lie for prosecution in an inferior court, where that court has not the jurisdiction. The first case in point was at *Huntingdon* assizes, and referred to the common pleas; and there adjudged, that to sue a man without any cause of action at all no action lies, unless it appears to be with a malicious and vexatious design.
S. C. Carth. 189.
S. C. 1. Show. 254. 1. Roll. Abr. 102. Cro. Jac. 133. 3. Petr. Wms. 104. 1. Bac. Abr. 63. Vide Hob. 267. Anonymous.

* Anonymous.

Case 12.

IF A DECLARATION be part well and part ill, it shall be good for that which is well declared of : but if a writ of enquiry be executed for the whole, or if entire damages be given, it is good cause to stay the judgment. 1. *Vent.* 27.

If on declaration, in part bad, entire damages be given, or writ of enquiry be executed for the whole, it is ill.—Hob. 189.

Anonymous.

Case 13.

A WRIT OF ERROR must be of a common return ; if on a day certain, it is naught : where the writ of error is *ubicunque*, the *scire facias* ought to be on a common day.

Writ of error must be on a common return.

Smith against Bromeley.

Case 14.

A LEASE FOR A YEAR, rent payable *quarteriatim*, and not said to be at the most usual Feasts or days of payment ; and avowry was made for rent due at *Festum Michael*. whereas it ought to have been the twenty-third of *September*, according to calculation.

Rent due 23d September declared of as due at *Michaelmas*, ill.

EYRE, Jusfice. If he had declared of a rent *aretro* at *Michaelmas*, it would have been well ; but here it is for a rent due at *Michaelmas* ; therefore not good.

Dr. Needham's Case.

Case 15.

IT WAS MOVED, that an execution on a *scire facias* on the goods of *Dr. Needham* might be avoided, because the writ was sealed and delivered to the sheriff after the defendant's death ; and the statute 29. *Car.* 2. c. 3. provides, " that no writ of *fiery facias*, " *&c.* shall bind the property of goods against whom such writ " is sued forth, but from the time that such writ shall be delivered " to the sheriff ;" and so provides, that the writ shall not bind goods against the party, and not, as in other cases, against the purchaser only ; and so *the Doctor's* goods not bound.

Scire facias sealed after the party's death, execution thereon good.

2. *Ld. Ray.* 850.
7. *Mod.* 95.
1. *Salk.* 87.
3. *Salk.* 116.

BUT PER CURIAM, This clause is to be understood of the goods of a purchaser purchased by him before delivery of the writ ; but as to the party, it shall bind as before from *the teste*, as it was before the statute.

1. *Sid.* 29.

Case 16.

* Willet *against* Tiddy.

Officer sued for
levying taxes to
have treble costs.

S. C. 1. Show.

214.

S. C. Carth.

388.

Cro. Car. 175.

285.

2. Vent. 45.

Dougl. 107. 245.

397. 780.

INDEBITATUS ASSUMPSIT for money received to the plaintiff's use. The defendant justifies, as collector of aid of the king by parliament given, by a distress warranted by the statute, and found for the defendant; and, If he shall have treble costs by that statute given for being sued in the exercise of his office? was the question, on motion.

And it was urged, that this is not matter concerning his office, for it may be for money received to his own use, or for overplus of distress not returned; and whereas action was brought by presentment in the ecclesiastical court against a constable, and found for him, it was adjudged out of the statute of 7. Jac. 1. c. 5. for it does not directly touch his office. 1. Cra. 285. Jones, 305. So in an action on the case for false presentment by a constable, that the plaintiff's lands were in the parish of S. it was adjudged, that he should not have double costs by the statute of 7. Jac. 1. because the question arises wholly on the place where the lands are, and not on the duty of the constable. 1. Cra. 467.

And HOLT inclined to that opinion; for if the action were brought for overplus not returned, this does not touch his office, and he does not use the statute for defence.

But because certified by the Judge of assize, that it was within the statute, the defendant had treble costs.

Case 17.

Edwards *against* Dickenson.

Case against a
post-master for
not delivering a
letter when re-
quested.

CASE against the post-master of *Bristol* for not delivering a letter, sent by him by post, upon request; and demurrer.

AND IT WAS HELD, that the action was well maintainable upon request and refusal, without any particular damage having accrued, for the miscarriage of a letter is damage; but if the defendant had tendered the letter, and the plaintiff would not pay postage, he is not bound to deliver the letter; but then this ought to have been shewed on the defendant's side.

Judgment was given for the plaintiff.

TRINITY TERM,

The Third of William and Mary,

I N

The King and Queen's Bench,

Sir John Holt, *Knt. Chief Justice.*

Sir William Dolben, *Knt.*

Sir William Gregory, *Knt.*

Sir Giles Eyre, *Knt.*

Sir George Treby, *Knt. Attorney General.*

Sir John Somers, *Knt. Solicitor General.*

} *Justices.*

• [7]

* Godefrey against Newton,

Case 18.

ERROR OF A JUDGMENT in the court of common pleas in an action of debt against an executor, after the lease was determined, for rent due in the testator's time on a parol lease. Rent due on an expired lease is of equal degree with debt on bond.

The defendant pleaded an obligation entered into to *A.* by the testator, *ultra quod* he had not assets, and so demands judgment. S.C. Comb. 183. Vide postea, Pasch. 11. Will. 3.

And on demurrer judgment was given for the plaintiff in the common pleas, and affirmed here. Cage v. Acton. Lev. 114. Off. Exec. 209.

For *PER CURIAM*, Debt for rent, upon a lease for years after lease ended, favours of the realty, and is in equal degree with debt upon a bond, and therefore a bond is not to be preferred to it: and so is *Office of Exec.* 209.

Chew against Briggs.

Case 19.

ATRIAL was in *Middlesex* on a traverse in *Surrey*; and this moved in arrest of judgment. Trial in a wrong county aided by 16. Car. 2. c. 8.

And *HOLT, Chief Justice*, was of opinion to stay the judgment, for that a wrong county is not remedied by the statute, but only a wrong *venue* in a right county. The words of 16. & 17. Car. 2. c. 8. enact, " That no judgment after verdict shall be arrested or

B 4

" reversed

Trinity Term, 3. Will. & Mary, In B. R.

CHIZW "reversed for that there was no right *venue*, so the cause ^{he} tried
against "by a jury of the proper place or county where the action was
BRIGGS, "laid;" these words are restrictive.
 1. Vent. 22.
 263. **DOLBEN, GREGORY, and EYRE, Justices, contra.** 1. Saund. 247.

EYRE, Justice. If it had been *res integra*, I should be of another opinion; but all resolutions being otherwise, I accord. *Sid.* 325. 1. Saund. 247, 248.
 * [8]

Cafe 20.

* Anonymous.

Semper paratus. **A**TOUTS TEMPS PRIST can never be pleaded after im-
 Postea, Mich. parance. On a bond after imparance, you may plead tender
 7. Will. 3. Wig- and *encore priß*, for no *toutes temps priß* need be pleaded in that
 more v. Veal. case.
 Postea, Mich.
 9. Will. 3. Giles v. Hart. Postea, Pasch. 12. Will. 3. Horn v. Luines.—See Tidd's Pract. 240. 379.

Cafe 21.

Anonymous.

Appearance helps a miscon- **H**OLT, Chief Justice. An appearance does not help a dis-
 tinuance, but continuance as it does a miscontinuance; and it is a question,
 not a disconti- whether discontinuance in process be helped by the statute of Jeofails,
 nuance. though discontinuance in pleading may be helped.
 See Tidd's
 Pract. 624.

Cafe 22.

Anonymous.

IF AN AWARD be, that a general release to the time of award may
 Vide Hob. 190, be given, a release to the time of the submission is a good gene-
 191. ral release.
 Postea, Hill.
 8 Will. 3. Hooper v. Pierce.

MICHAELMAS

MICHAELMAS TERM,

The Third of William and Mary,

IN

The King and Queen's Bench.

Sir John Holt, Knt. Chief Justice.

Sir William Dolben, Knt.

Sir Giles Eyre, Knt.

Sir William Gregory, Knt.

} *Justices.*

Sir George Treby, Knt. Attorney General.

Sir John Somers, Knt. Solicitor General.

Anonymous.

Case 23.

IN a *homine replegiando* one must plead *instante* without imparlance, as in an appeal.

* [9]

The King *against* Davis.

Case 24.

UPON AN INFORMATION FOR A RIOT a trial was had, and a verdict given for the defendant, and a new trial * prayed for, for the king; and *Sir John Jackson's Case* alledged.

No new trial on acquittal, on information, for being against evidence; *alter* if by fraud or surprise.

THE COURT said, that was proved to be by fraud; and since that, in HALE's time, a new trial had been granted, the verdict being obtained by fraud; but this verdict being only against evidence, but no fraud, a new trial was denied. A new trial was granted in the case of *The Queen v. Coke*, the acquittal being by surprise upon the prosecutor, for want of notice, it being brought on by the defendant; it was in *Michaelmas Term*, in the third year of *Queen Anne*, on an indictment for keeping a common bawdy-house.

S. C. 1. Show. 336.
1. Sid. 149. 153.
1. Lev. 124.

Hill *against* Mills.

Case 25.

THE BANKRUPTCY of an executor is no cause of granting administration to another. Where there is a natural disability, there is a necessity of doing it, but it must be *ad usum et commodum* of the executor; so the last granting of administration is a nullity, and *ipso facto* void.

S. C. 1. Salk. 36.
S. C. 1. Show. 293.
S. C. Comb. 185.
S. C. Skin. 299.

S. C. Holt, 305. Justi. Inst. lib. 1. tit. 26. f. 12. 1. Lev. 157. 1. Sid. 280. 1. Lev. 186.
1. Sd. 293. 370. Skin. 299. Comb. 185. Pettes, Mich. 10. Wil. 3. The King v. Richard Rains.

Styrop

Michaelmas Term, 3. Will. & Mary, In B. R.

Case 26.

Stryrop *against* Stoakes.

In what case the spiritual court has jurisdiction.

IF MONEY be disbursed by churchwardens for repairing the church, or anything else merely ecclesiastical or spiritual, the spiritual courts shall allow their accounts: but if there be anything else that is an agreement between the parishioners, the succeeding churchwardens may have an action of account at law, and the spiritual court has not jurisdiction.

Case 27.

Stockwell *against* Collifon.

Commissioner entitled to fees on a quantum meruit.

ASSUMPSIT, on consideration that he had assumed to serve the defendant as commissioner to examine witnesses in a suit between him and *B.* that the defendant promised to pay him for his pains.

S. C. 1. Show. 342.
S. C. Salk. 330.
S. C. Comb. 186.
S. C. Carth. 208.
S. C. Holt, 7.
Show. 77.
Stra. 747.

It was alledged, that a commissioner could not have an *assumpsit* on such a promise, for he ought to be indifferent, and it is unlawful to be paid for such service; as a promise, in consideration that the plaintiff would take a special warrant and arrest to pay such a sum, is void (*a*). If a man, in consideration of money, undertake to do execution, it is not good (*b*).

* [10]

But *PER CURIAM*, * A commissioner is named by the party, and it is intended he would favour him; and therefore it is a challenge to the favour that he is a commissioner at the denomination of the party, though no principal challenge (*c*); and a commissioner takes pains to attend the examination of witnesses, and therefore deserves recompence as well as a commissioner of bankruptcy; and there is a difference between him and a sheriff (*d*).

Judgment for the plaintiff.

(*a*) Noy, 78.
(*b*) Cro. Jac. 103.
(*c*) Co. Lit. 157.

(*d*) See *Stotesbury v. Smith*, 2. Burr. 924. S. C. 2. Bl. Rep. 304.

Case 28.

Jones *against* Beau.

Office of register of Landaff may be granted to two.

ON AN ISSUE out of chancery it was found, that the bishop of Landaff, in Wales, in the year 1671, granted the office of the register (which was several times granted to two since the statute of 1. Eliz. and no grant to one only proved before the statute) to Sir R. Floyd and the plaintiff; and the plaintiff claimed the office by force of the grant.

S. C. 4. Mod. 16. 19. 27.
S. C. 2. Salk. 465.
S. C. 1. Show. 288.
S. C. Carth. 213.

And it was agreed, that if such grant to two had been good at common law, it would not be defeated by the statute, for it allows a grant to two where the usage had been so; and the constant usage since is good evidence of its having been so before.

But it was argued, that such a grant had been void at common law; for this is a judicial office, which cannot be granted to two in reversion (*a*). The office of Chief Justice is not grantable to two.

(*a*) 11. Co. 4.

But

Michaelmas Term, 3. Will. & Mary, In B. R.

But *PER CURIAM contra*. A judicial office may be granted to two as well as a ministerial one; and no inconvenience more in the one case than in the other; the office of a Judge may be well granted to two. If these two chancellors differ, the bishop may sit himself, and their authority ceases.

JONES
against
B.A.D.

The College of Physicians *against* Bassett.

Case 29.

IN AN ACTION for practising physic without licence, the declaration laid it to be "at *Westminster, in Com. Midd.*" but not that it was within seven miles of *London*; and therefore bad.

Pleading.
S.C.4. Mod. 476
5. Mod. 327.
1. Ter. Rep. 143.

Anonymous.

Case 30.

ASHERIFF cannot return a *rescous* upon a writ of execution.

1. Vent. 21.
2. Hol. Ab. 459.
pl. 2.
3. Lev. 46.

Anonymous.

Case 31.

PER CURIAM. Where there are several executors, and only some of them appear and plead, judgment must be against * them all; but execution *de bonis propriis* shall go against him * [11] that has appeared.

Executors.
* [11]

Item, Submission to award by executor is a *devastavit*.

Germin and his Wife *against* Orchard.

Case 32.

TRESPASS for breaking the plaintiff's close. The defendant pleaded, that *J. S.* was seised of the place *WHERE* in fee, and being so seised demised it to the plaintiff's testator for a certain number of years, &c. and that the testator by deed assigned it to the defendant. And to another part of the place *WHERE*, &c. he pleaded another plea. To which the plaintiff demurred, having traversed the assignment, and a *venire facias* was awarded, "*tam ad triandum exitum prædictum, quam ad inquirendum de damnis*," in case judgment should be for the plaintiff upon the demurrer.

Grant of a term for years to a man, *habendum* after the death of the grantor, the term passes presently, and the *habendum* is void.

The jury found a special verdict, that *B.* by deed, reciting, that whereas *J. S.* had demised such a house to him, and land, &c. he granted and assigned to the defendant the said house and all other the premises and appurtenances, together with the said recited lease, and all writings and evidences concerning the same, to have and to hold from and after the death of the assignor and his wife, for and during the residue of the said term unexpired; *et si Cur.* it is a good assignment for the plaintiff, *secus* for the defendant; and assess damages, &c. but assess no damages on the demurrer, for on that there was a *nolle prosequi* entered.

S. C. 1. Salk. 346.
S. C. 3. Salk. 222.
S. C. Skin. 538.
S. C. Holt, 331.
S. C. 1. Freem. 500.

SIR BARTHOLOMEW SHOWER. This is no good assignment. The office of *premises* is to ascertain the estate intended to pass in the *habendum*; but though the premises do make the estate certain,

Michaelmas Term, 3. Will. & Mary, In B. R.

GRAMIN
AND HIS WIFE
against
ONCHARD.

* [12]

certain, yet it may be utterly defeated by the *habendum*; and therefore here the *habendum*, limiting the commencement of the lease to be from the death of the assignor and his wife, defeats the premises. A lease for years should have a certain commencement and ending, otherwise it is void (*a*); and here the time of the assignor's death is not known; and an *habendum* not only alters and abridges, but sometimes wholly frustrates the premises. A feoffment to *A. habendum* after the death of the feoffor, is void (*b*). True it is, that if a grant be complete in the premises, a contradicting *habendum* shall be rather void than defeat it (*c*). And if it be objected, that all the term is granted here in the premises by the words, "the said recited lease;" it may be answered, that by the word "lease" the term is not extended, but the deed indented only, because of the words subsequent, "all the writings and evidences."

It was argued likewise, that the verdict was good, notwithstanding the omission of enquiring of damages on the demurrer; for as to that, it is but an inquest of office, and may be supplied by another writ (*d*). But if the verdict would have been deficient for this cause, it is aided by a *nolle prosequi*; for where a verdict is insufficient, by assessment of entire damages, or non-assessment of damages and costs where they ought to be assessed, it cannot be supplied by a writ of enquiry; but release of damages and costs remedies suits and imperfection in the verdict.

CONTRA. The word "lease" contains all his interest in the land, and not the deed indented only; for if the indenture were intended to be conveyed only, it might have been by the other words, "all writings, &c.;" and then the word "lease" ought to carry the term, otherwise it will be of no use; but such construction ought to be made as *accipiantur cum effectu*; and the word "lease" comprehends all his estate in the lands. A man pleaded that he had surrendered *dimissionem præd.* and it was construed a surrender of his interest (*e*). Then all his interest being given in the premises, the *habendum* being contrary is void (*f*). And if the assignment be good, the verdict is void; for if the jury had found excessive damages on the demurrer, attaint would lie against them; and in all cases where attaint would lie against the petit jury for excessive damages, there, if no damages be assessed, such an omission shall not be supplied by a new enquiry (*g*).

PER CURIAM. This assignment is void; for if a man grant a lease for years, *habendum* after death, it is void.

EYRE cited a case to the contrary (*h*).

(a) Co. Lit. 45.

(b) 3. Cro. 254.

(c) Hob. 17. Dyer, 272.

(d) Dyer. 125. 11. Co. 6.

(e) See the case of *Peyton v. Pemberton*,

Cro. Ca. 101.

(f) 1. Co. 155.

(g) 11. Co. 119. 2. Roll. Abr. 722.

(h) 2. Roll. Abr. 66.

But

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But it was denied by HOLT, *Chief Justice*, and not minded by the others ; and a diversity was taken, where one grants his term for so many years as shall be arrear after his death, and a grant of his term for four or more years in certain, *habendum* after his death, the first is void, the second good (a). And the verdict is insufficient, and such insufficiency not aided by a *nolle prosequi*.

GRIMIN
AND HIS WIFE
against
ORCHARD.

1. Vent. 83.

And judgment was given PER TOTAM CURIAM, that the assignment was not good.

This judgment was reversed in the exchequer-chamber, and that reversal affirmed in the lords.

(a) 1. Co. 155.

* The King and Queen against Evans.

* [13]
Case 33.

MANDAMUS to restore *Evans* to the office of clerk of the peace.

A misbehaviour was returned, viz. that a demand being made of THE ROLLS, he did not deliver them to the *custos rotulorum*.

And a *peremptory mandamus* was moved for ; for the statute 1. Will. & Mary vests a freehold in the clerk *quamdiu se bene gesserit* ; they are to remove him but on misdemeanor in the execution of his office ; and articles against him are to be put in writing ; which is not said to have been done.

HOLT, *Chief Justice*. The keeping of rolls does of right belong to the *custos rotulorum* : the clerk of the peace is a distinct officer, and not a mere servant ; and his business is to make up THE ROLLS, and enter them.

A *peremptory mandamus* was granted.

Parker against Winch.

Case 34.

HOLT, *Chief Justice*. An ancient demesne manor is impleadable at common law, but the lands holden of the manor are only impleadable in the court of the manor ; and laying it in the declaration to be part of the manor, shews it not impleadable in the court of the manor ; for land holden of the manor cannot be said to be part of the manor (a).

EYRE, *Justice*. The rent may be parcel of the manor, and so may the services, though the land is frank-fee ; and whatever is holden of the manor is not part.

(a) See Doe on the demise of Rust v. Roe, 2. Burr. 1046.

Coke against Hawkins.

Case 35.

MOTION for a prohibition to the spiritual court for a suit for defamation, and it being after sentence it was denied, because they had not pleaded to the jurisdiction of the court. *Quere.* granted after sentence.—S. C. 1. Show. 337. Cro. Car. 110. 3. Lev. 339. 1. Mod. 22. 2. Vent. 61. Salk. 692. Stra. 823. 4. Com. Dig. 508. 2. Term Rep. 473.

Prohibition to
the spiritual
court, on suit for
defamation, not

The

Michaelmas Term, 3. Will. & Mary, In B. R.

Cafe 36. The King *against* The Inhabitants of Hornsey.

Highways.

S. C. Fort. 254.

S. C. 1. Show.

270. 291.

S. C. 4. Mod. 38.

S. C. 10. Mod.

250.

S. C. Holt, 338.

S. C. Carth. 212.

HOLT, Chief Justice. Upon a presentment for not repairing a highway, on not guilty, you cannot give anything in evidence but only that the way is repaired. If they plead that they ought not to repair, they must set forth who ought. You cannot give in evidence "no highway," but may traverse it.

EYRE, Justice, contra.

DOLBEN, Justice. They may give in evidence that it is no highway, but not that they ought not to repair (a).

(a) See *Rex v. Justices of Wilshire*, *Rex v. Great Broughton*, 5. Burr. 2709. 3. Burr. 1530. 2. Hawk. P. C. ch. 76. Cowp. 648. 3. Term Rep. 265. *Rex v. Weston Penyard*, 4. Burr. 2507.

HILARY TERM,

The Third of William and Mary,

I N

The King and Queen's Bench.

Sir John Holt, *Knt. Chief Justice.*

Sir William Dolben, *Knt.*

Sir William Gregory, *Knt.*

Sir Giles Eyre, *Knt.*

} *Justices.*

Sir George Treby, *Knt. Attorney General.*

Sir John Somers, *Knt. Solicitor General.*

* [14]

* Cudlip *against* Rundall.

Case 37.

CASE. The plaintiff declares, that being possessed of a house, with the appurtenances, the twenty-fifth of *March*, 36. *Car.* 2. for a term of years then and yet unexpired, by indenture demised them to the defendant for seven years next ensuing, who entered and was possessed, *et ignem suum in domo prædicta tam negligenter custod.* that on the eighth of *November* the house was burnt, *ad damnum suum* of three hundred pounds. The defendant pleads, *non dimisit modo et formâ.* Issue is joined; and a special verdict, that the plaintiff was possessed, and the twenty-fifth of *March*, 36. *Car.* 2. demised by indenture to the defendant "all that one messuage, &c. together with all houses and out-houses to the same belonging, excepting and always reserving out of the said demise to the plaintiff, his executors or administrators, the house commonly called *the New House*, new built upon the premises, for the use only of the father of the said plaintiff, the said plaintiff, their wives and families, to live in as they please, but not to be let to any person or persons whatsoever; and all other times when they shall not dwell there, to be used by the defendant, his executors, administrators, and assigns, to hold the premises, except as before excepted, to the defendant for seven years;" that at the time of the lease there were two mansion-houses on the premises, one old one, and one new built; that the new built house was only burnt; that at the time

Where part of a thing demised in general words is well excepted by particular words.

S. C. 4. Mod. 9.
S. C. 1. Show. 310.
S. C. Carth. 202.
S. C. Comb. 177.
S. C. 3. Salk. 156.
S. C. Holt, 410.
Co. Lit. 47.
Cro. Eliz. 6.
372- 527.
Shep. Touch. 72.

Hilary Term, 3. Will. & Mary, In B. R.

CUDLIP
against
RUNDALL.

* [15]

No action on the
case lies for te-
nant at will's
negligently
keeping his fire.

See 1. Bl. Com.
431.
1. Bac. Abr. 55.
242.
2. Will. 145.
Dougl. 183.
1. Term Rep.
430. 535.
2. Term Rep.
166. 232.

time of the fire the defendant was in possession of the new built house, except one room which the plaintiff had, and that the house was * burnt by fire negligently kept by the defendant in the part of the house in his possession. *Et si, &c.*

And it was agreed in this case, that no action on the case lies against a tenant at will for his neglect in the custody of his fire, by which his house was burnt. 5. Co. 13. b.

So THE SOLE QUESTION here was, if the defendant was other than a tenant at will of the new house ; and if the house was demised to him for seven years.

Et PER CURIAM seriatim, It is not ; for the lease is made of the messuage, &c. except the new house, so that it is excepted by express words in the premises, and also in the *habendum*, which is not contrary or repugnant to the premises ; for there was another house demised, which supplies the words, " together with all other houses ;" and where the exception does not defeat the grant, or is contrary to it, it must stand ; as *Dyer*, 264. b. *Hob.* 170. And if the exception be good, then the question will be, if it be not avoided by these words, " reserving to the plaintiff, his execu- tors, &c. ;" for an exception out of an exception puts the matter at large.

Et per HOLT, Chief Justice. If a man lease his houses, excepting his new house, during the term, this exception is good ; but if he except it during life, it is void : or if a man, having a term of two houses for certain years, grant his houses, excepting one of them, for life, this exception is void ; for the words " during life" qualify the exception, and shew his intent, that the one house shall not be excepted during the whole term, and so is void ; which difference appears in *Dyer*, 264. b. ; but here the new house is excepted to the lessor, &c. which makes a full exception ; and the words, " to the use of him only, &c." do not qualify, but rather declare the intent of the exception.

Vide 1. Vent.
78. 106.

Judgment for the defendant.

In this case the plaintiff did not aver that the lease was not expired at the time of the fire.

Case 38.

Meggadow against Holt.

Bills of ex-
change.

S. C. 1. Show.
317.
S. C. Holt, 113.
Kyd on Bills,
116.
1. Term Rep.
267.
2. Term Rep.
713.

ACTION was brought upon a bill of exchange, in which the plaintiff declared, that the defendant drew a bill of exchange, according to the custom of merchants, on *W.* merchant at *Rotterdam*, payable to *H.* within two usances and a half, and alledged them to be at *Rotterdam* two months and a half ; and alleges the custom, that if such a bill be protested for non-payment the drawer is liable ; the bill is assigned over, and alledged to be tendered to *W.* and that he did not pay. The plaintiff protested, and brought his action against *Holt*.

And

AND PER CURIAM, Judgment for * the plaintiff. First, The law of merchants is *jus gentium*, and part of the common law; and therefore we ought to take notice of it, when set forth in pleading (a). The law of merchants in this case is, that if he who has such a bill lapse his time, and do not protest or make his request, if any accident happen by this neglect in prejudice to the drawer, he hath lost his remedy against him; but if such a thing had happened, it ought to have come of the other side; and not being so, we must judge on the declaration. It is not necessary to shew the custom of merchants, but it is necessary to shew how the usage shall be intended, because it varies as places do.

MREGGADOW
against
HOLT.

(a) Co. Lit. 11. 182.

Potter against James.

Case 39.

ASSUMPSIT *pro den. debit. et insolut.* is not good, without setting forth a contract, or for what the money was due.

S. C. 1. Show.
347.
S. C. Comb. 187.

Postea, Pasch. 13. Will. 3. Palmer v. Stavelly.

Anonymous.

Case 40.

WHERE there is a false capture of goods at sea, the admiral has jurisdiction; and if they be brought to land, the common law has; and the cause may be brought in either place, at the plaintiff's election.

On false capture
at sea, the admiral
has jurisdiction.

Anonymous.

Case 41.

ADMINISTRATION may be granted to the next of kin, or to the wife or next of kin to the intestate, as the spiritual judge pleases; the wife shall come in for a share by the new statute; and as to creditors, they are all one administrator; the Court may divide the administration, or give it all away as they please. But the husband shall have administration of the wife before all others; so if she has credits.

Administration
may be granted
to the next of
kin or to the
wife.

Postea, Hill.
13. Will. 3.
Blackborough
v. Davis.

Fisher against Baston.

Case 42.

ERROR OF A JUDGMENT given in an inferior court, "*per seneschall. hic in cur.*" and affirmed; for though if it be "*per seneschall.*" only, without more, it would be ill, because it might be in a tavern or other place, yet being said "*in cur.*" shews it to be in court judicially.

Inferior court.

Cafe 43. * The King and Queen *against* The Mayor of London.

Mandamus to restore him to the place of alderman of the city of London.

S. C. 1. Show. 263. 274.
S. C. Carth. 217.
S. C. Skin. 293.
310.
S. C. Holt, 168.
310.

AMANDAMUS to the mayor and aldermen of London to restore *Sir J. Smith* to the place of alderman there. They return, that *Sir J. Smith*, the thirteenth of *February*, was an alderman of the city, being before that time duly elected and admitted into the office, according to the custom of the said city; and that he so continued from the thirteenth of *February* to the making of the act for abrogating the old oaths and appointing new ones, and from thence to the first of *August* next following; but that he did not take the oaths appointed by that statute, nor hath since been chosen into the place of alderman; and therefore his office being void by his not complying with the act, they cannot restore him.

The difficulty rested solely upon the statute for reversing the judgment given in the *quo warranto*, and whether this return was not contrary to it; for if by that judgment there recited the corporation was dissolved, then the return of his being alderman is frivolous, and he not obliged to take the oaths, not being an officer at that time, till restitution of the liberties of the city by the act that was made after.

Return must be taken as true till falsified.

EYRE, Justice. The return is sufficient; for it must be taken for true until the party falsifies it by bringing an action, unless anything in the act of parliament alters the case; for the Judges are obliged to take notice of it, being declared a public act, and nothing is in it to make the return contrariant. The judgment entered in this case was very different from what is recited in the act; but the Court takes notice of it only as it is there recited, which is, "I hat the liberty, privilege, and franchise, of the mayor, and commonalty, and citizens, being a politic body, and corporate, should be seized into the king's hands:" by which judgment the corporation is not dissolved, so that *Sir J. Smith* continued still an alderman of that body. The judgment in the most sensible terms is a seizing of the corporation into the king's hands, which could not be; for that rests solely in intendment of law, and is inseparable from the members; and what the king cannot have, judgment of seizure cannot give him. 2, Cro. 260. The judgment here should have been a judgment of ouster; and this is such a judgment as is without precedent, which makes suppositions. There are several judgments for seizing of franchises, but never for * seizing of corporations; the corporation is always supposed to be prior in law (a). If a corporation may be seized *nominè districtionis*, or otherwise, it is dissolved; for when it is merged in the crown, the king may make a new one, but cannot restore the old. A corporation is something besides franchises, for it is a capacity to hold as a natural body; and though it may cease to be *in actu exercito*, yet it may be *actu signato*. Neither does a seizure of office dissolve one; for on making a corporation, the king may reserve the naming of

* [18]

Judgment may be of seizing of franchises, but not of corporations.

officers

Hilary Term, 3. Will. & Mary, In B. R.

officers to himself, and suspend it for a time. And it not appearing by the preamble what the franchise is that was seized, it must be taken for truth that he continued an alderman; and he is not helped by the other clauses.

THE KING
AND QUEEN
against
THE MAYOR
OF LONDON.

GREGORY, *Justice*. The Court cannot take notice of any other judgment but what appears by the preamble.

DOLBEN, *Justice*, doubted. If the return be true, they cannot restore Sir J. Smith; the only difficulty is, whether it be possible to be true or not. Franchises that remain in the king may be seized; the parliament does not declare it null from the beginning, but only illegal. If it had been "liberties, &c." Sir James Smith should have been restored; but here it is only "*præd.*" "liberty," but the enacting clause is positive; *ideo dubitat*, and not willing that a peremptory *mandamus* should go.

HOLT, *Chief Justice*. The writ is, that he was duly elected an alderman *secundum antiquas consuetudines civit. præd.* The return agrees with the writ, that he was elected, but that he did not take the oaths. If this act had not been in the case, undoubtedly this had been a good return. In this act, by the word "officers" aldermen without doubt are understood; but if the return be contrary to the act, it must be rejected. If the king should now make such an officer as an alderman, it would not be good, for the law understands no such officer but of a corporation. By the judgment, as recited, the corporation is not dissolved. It was a *quære*, whether a corporation could be dissolved; but surely it may. It is such a franchise as may be forfeited; but a judgment of seizure is no proper judgment to dissolve a corporation. There are three sorts of liberties: First, that which did exist in the crown before, as felons goods; secondly, created *de novo*, which exist though forfeited, as leet, market; third sort, which cannot exist but in persons; and in that last, judgment ought only to be for ouster, for the king cannot have it himself: but judgment final, that the liberties shall be seized and forfeited, will oust * them of franchises. Here it does not appear that any judgment was actually given that the franchise, being a body politic, should be seized: the liberty of the mayor is not the being of the mayor; by a surrender of liberties and privilege, the corporation is not dissolved. 3. *Co. Dean and Chapter of Norwich's Case*, fo. 166. He agreed, that if a corporation were made to a particular purpose, and they devote themselves of all right, so that they cannot answer the end of their institution, it is thereby dissolved; as in the case of a private corporation for charity, before the Restraining statute: but if the end of a corporation remained, as in a borough to make by-laws and governing it, the corporation remains still, and the making of by-laws is no franchise but part of the constitution; and so as the matter stands no peremptory *mandamus* (a).

Vide 9. Co. 25.

* [19]

If a corporation be made to a particular purpose, and the purpose for which they are created ceases, it is dissolved.

(a) See S. C. 1. Show. 264. 2d edit. *noti*.

E A S T E R T E R M,

The Fourth of William and Mary,

I N

The King and Queen's Bench.

Sir John Holt, Knt. Chief Justice.

Sir William Dolben, Knt.

Sir William Gregory, Knt.

Sir Giles Eyre, Knt.

} *Justices,*

Sir George Treby, Knt. Attorney General.

Sir John Somers, Knt. Solicitor General.

Case 44.

Hare against White and his Wife.

Baron and feme.

TRESPASS against husband and wife. Upon general issue, the husband is acquitted, and the wife found guilty.

And it was moved, that the husband should have been joined only for conformity; and there is a writ in *the Register* to that purpose, 105. b. which ought to be pursued; and so is *Yelv.* 106.

But *CURIA contra*; for there is no diversity in the case of *baron and feme*, and where trespass is against any other two, and one of them is found guilty. *Cro. Jac.* 203.

* [20]

Case 45.

* *The King against* ———.

Order of sessions
on appeal is fi-
nal.

PEMBERTON moved to quash an order of two justices of peace made at their sessions, which reciting a precedent order made by two justices to remove a poor man from *H.* to *B.* in the said county, because it appeared to them that he had rented a farm of ten pounds a-year in *H.* ordered he should be settled at *H.*; and moved to have the matter examined here.

But *TOTA CURIA contra*. But they agreed, that in all cases where a statute gives appeal from two justices to the sessions, the order

Easter Term, 4. Will. & Mary, In B. R.

order on such appeal is final; though the statute do not expressly say so: and this Court cannot examine the fact, but only quash the order, if contrary to law on the face thereof.

Tax King
against

And *per* DOLBEN, *Justice*, If a conviction be on the statute of deer-stealers, the fact cannot be afterwards examined here, for the parliament has made the justices sole judges of such petty matters.

Then SHOWER moved to quash the order, because the sessions ought only to quash or confirm the order of justices; yet they have not reversed the former order, but ordered a settlement at *H.* without more ado.

But by DOLBEN, *Justice*, and EYRE, *Justice*, The settlement at *H.* being the place from whence he was removed, is a reversal of the first order.

But HOLT, *Chief Justice*, thought they had not power to settle him at *H.* because it did not appear he had been settled there forty days; for though he had a farm there, yet it is not a settlement if he leave it within forty days. Then the sessions ought to have quashed the first order, but not to settle a poor person who had no settlement.

But the other Justices *contra*, *absente* GREGORY, it was confirmed.

Loowder against Screwdens.

Case 46.

IN an appeal of murder the plaintiff counts at bar *in propria persona*, but the roll put into court, where the count was entered, was by attorney.

In appeal, the plaintiff must appear in person; if not, he may be demanded and nonsuited: but the appeal may be altered according to the truth of the fact before it be filed.

An exception was taken, that the appellant was nonsuited, for that he appeared by attorney where he ought to come *in person*; and such appearance is void, and so nonsuit by default; and if not a nonsuit, the appeal is discontinued, for he ought to appear *instanter*, which he has not done; for at the day of the return of the writ the appellant ought to have counted *instanter*, but his count was by attorney, which is no count; and then the appeal is discontinued: as if a woman bring an appeal *de morte viri*, and at the day of the return the parties appear, but at the day the sheriff *non misit breve*; wherefore the plaintiff prayed an *alias*, but the appellee demanded a count; and because she refused, the appellee was discharged (a).

[21]
S. C. 4. Mod. 99.
1. Salk. 64.
Dyer, 120.
Latch, 173.
1. Bac. Abr. 126.

* CURIA *contra*. The appellant here shall not be nonsuited, for none can be nonsuited that is not demanded; but he was not demanded, wherefore appearance by attorney cannot be a nonsuit (b). In an APPEAL OF MAYHEM, the plaintiff came by attorney, which

(a) Easter Term, 33. Hen. 6. Roll 39.
Rastal App. 46. cited in the case of Eger-
ton v. Morgan, 1. Eulst. 71.

(b) 2. Inst. 313.

Easter Term, 4. Will. & Mary, In B. R.

de-west
ag-uyfi
Spartanens.

could not be, and the plaintiff was demanded, and for default nonsuited; but there it is plain, that if he had appeared on demand, he could not have been nonsuited: so here, if the appellee would nonsuit the appellant, he must have demanded him; but here the appellant was present, and viewed by the court, and shall not be nonsuited if demanded at a day he is not demandable at. Then as to the *discontinuance*, that cannot be before imparlance; but the day the Court took to advise shall not make a continuance, but shall be intended the first day. It is true, the appellant had a day by THE ROLL and by the writ, and on every one of them is demandable. In the case in *Rafial*, he came on the day by the roll, and because he refused to count, the appeal abated; here he appears on the day given by the writ, and has counted, and that *in propria persona* as he ought; and though THE ROLL be "*per attornat.*" that shall be altered: though an appeal cannot be altered at common law, nor by any statute of *Jeofail*, yet it may be altered according to the truth of the fact before it is filed or becomes a record.

Whereupon THE ROLL was amended, and the defendant pleaded "not guilty."

And it was said in this case, that where the grand jury or inquest finds a man guilty, he is ousted of battail on appeal.

Case 47. Ferrers on the Demise of Upton *against* Miller.

In ejectment, a plea in abatement "venit et defendit," without saying "*vim et injuriam, &c.*" and no pleading can be, unless he make himself a party by defence (a), unless it be in an *affize* or *scire facias*, for there no defence is to be made; but in all personal actions the plea says, "*venit et defendit* good, if the plaintiff receive it." leave out the word "*quando.*"

* [22] BUT on the other side it was said, the precedents were both ways.

S. C. 1. Show. 386. S. C. 2. Salk. 217. AND IT WAS ADJUDGED good without "*defendit vim (b)*;" but unless he make himself a party to the writ, by making defence, you are not bound to receive his plea; but if you do, it is good.

S. C. Carth. 220. S. C. Holt. 219. 3. Lev. 182. 1. Brownl. 57. Dyer, 157. Cro. Eliz. 826. Stiles, 273. Lutw. 7. 4. Bac. Abr. 35.

(a) Co. Lit. 127. b.

(b) But by BULLER, *Justice*, in the case of *Thompson v. Stockdale*, Hilary Term, 23. Geo. 3. it is now settled, that

in all dilatory pleas, except such as go to the jurisdiction, a full defence must be made, 1. Ld. Ray. 117, 118.

Easter Term, 4. Will. & Mary, In B. R.

The King and Queen against Warrington.

Case 48.

INFORMATION against the defendant for a riot in *Chester*, which is a county-palatine, and therefore to be tried there.

And a suggestion being entered on THE ROLL, that the sheriff was of affinity with the defendant, the *venire facias* issued to the other sheriff only, and a jury returned; and the defendant found *not guilty*, and the record removed hither.

IT WAS MOVED in *arrest of judgment*, that the *venire* was ill directed, for it ought to have been to the coroners.

HOLT, *Chief Justice*, delivered the opinion of the Court. The *venire* is well, and the trial good; and so adjudged before in the case of *Sir D. Rich v. Sir Tho. Player (a)*, where the *venire* was directed to *Sir D. North* only, the other being a party; for the sheriff is the proper officer to whom the return of the writ belongs; and the law does not commit it to others without default or partiality suspected, and then constitutes the coroner; but where there are two sheriffs, and only one of them suspected of partiality, and for this defect is challenged, his companion is as proper a person to supply that defect as the coroner. But it is said, both sheriffs make but one officer, yet every one of them is a sheriff; the coroners are but one officer, yet if there be two coroners, and one of them be challenged, and if four, and three be challenged, the *venire* shall go to the other; but if none, it is directed to them all (b). So a *venire* is not to be directed to the coroners but on default of the sheriff. If the sheriff die, process does not issue until another be, and shall not go to the coroners. It is the challenge only makes the coroners or any of them officers; and why may not the challenge as well make the other sheriff an officer? In a *quare impedit* against the archbishop of *York*, if he be found disturber, the writ *de admit-tenda idonea persona* goes to the archbishop of *Canterbury*; yet he has not superiority, but only precedence (c).

And *venire* well awarded.

(a) *Skin. 102.* 2. *Show. 262. 286.* (c) *Dyer, 327. 350.* 1. *Brown. 159.*

(b) *Naylor v. Sharpley and Others, Fitz. N. B. 38.*
1. *Mod. 198.*

Where there are two sheriffs, and one is challenged, the *venire* must go to the other, and not so the coroner.

S. C. *Salk. 152.*
S. C. *Carth. 214.*
S. C. 4. *Mod. 65.*

S. C. *Comb. 191.*
S. C. *Holt, 166.*
S. C. 1. *Show. 327.*

2. *Roll. Abr. 667.*
Dyer, 367.
Stra. 253.

Cowp. 112.

* [23]

* Pitcher against Tovey.

Case 49.

ERROR OF A JUDGMENT in the court of common pleas in an action of covenant, wherein the plaintiff declared, that by indenture bearing date the ninth day of *July*, in the year 1680, he demised a house in the parish of *St. Martin's, &c.* rendering rent, with covenant for payment to *R. Gill*, who assigned to the defendant;

If a lessee assign the term to a person, who assigns to A. without notice to the lessor; the lessor cannot have co-

tenant against the original lessee for arrears of rent, after the assignment to A.—S. C. 4. *Mod. 71.*
S. C. 1. *Salk. 81.* S. C. 2. *Vent. 234.* S. C. 3. *Lev. 295.* S. C. 1. *Show. 340.* S. C. *Carth. 177.*
1. C. *Holt, 73.* S. C. 1. *Freem. 326.* 1. *Stra. 405.* 1. *rec. Chan 156.* 1. *Bac. Abr 536.* *Dough.*
83. 128. 444. 735. 3. *Burr. 1271.* 3. *Term Rep 393.*

Easter Term, 4. Will. & Mary, In B. R.

PITCHER
against
TOWLEY.

and for rent arrear for three years after assignment he brings covenant.

The defendant as to part pleaded *nil debet*, and as to the residue an *assignment* over before it incurred.

The plaintiff demurred.

And judgment was given by THREE JUDGES in the common pleas for the plaintiff.

AND IT WAS URGED for the defendant here, who was plaintiff below, that there was a *privity of estate*, though no *privity of contract*, between the assignee of a term and the lessor, after acceptance of him for tenant, which continues, notwithstanding the assignment, until notice of it : as if a tenant make a feoffment, the lord shall avow upon him for rent arrear until notice of it (a). And so it was adjudged (b) in the case of an assignee of a term by two Justices ; and TWISDEN's reason to the contrary is not good, that the lessor had remedy by distress ; for there is no reason that the lessor, who had two remedies, should be deprived of one of them ; for he cannot have debt where the party to whom the term is assigned is not known to him ; and perhaps his remedy by distress may fail, where the assignment is to a poor man, who is not able to manure the land, or by indigence or otherwise suffers it to lie fresh, and then the lessor shall be without remedy by distress, or by action of debt ; and such notice ought to be pleaded, as in the case of *Marrow v. Turpin*, 3. Co. 24. a.

But PER CURIAM, *absente* GREGORY, Justice, the judgment was reversed ; for debt lies by the lessor against the assignee only upon privity of estate, and when this fails by the assignment over that action is at an end ; and it is not like an avowry, which shall be made on a person certain. That of *Sid.* 339. was hastily resolved by two against TWISDEN, and the Bar thought it new law. The lessor is not at such great prejudice as is pretended, for he may distrain, or have covenant against the lessee or his executors ; and if there be no covenant for payment, he may have debt against the second assignee, when known ; and if that were not so, it was his own folly that he accepted the first assignee for tenant, by which he gave him a liberty of * assignment to the other, and discharged the lessee.

Judgment was reversed, and *nil dictum* as to the point of notice (c).

(a) 3. Co. 23. a.

(b) 1. Sid. 339.

(c) See *Lekeux v. Nash*, 2. Stra. 1221.
Honord v. Hatch, Dougl. 182. 186.

Barnfather v. Jordan, Dougl. 452.

Eaton v. Jaques, Dougl. 455. *Walker*

v. Reeves, Dougl. 461. *Chancellor v.*

Poole, Dougl. 764.

Trial

Easter Term, 4. Will. & Mary, In B. R.

Trial on the Custom of the Manor of Bray.

Case 50.

ON EVIDENCE the Court said, that a copy of a court-roll of a manor is good evidence ; for wherever the original is evidence, there a copy is. Copy of a probate is good evidence (a). Where original is evidence, copy of it is so.

Sir F. L. was refused to be a witness of a custom, because he claims by it ; but any tenant of a manor that claims not by the custom is a good witness.

(a) See Mr. Nolan's note to the case of Rex v. The Hostmen of Newcastle, 1. Stra. 1222.

Anonymous.

Case 51.

PER CURIAM. Where a *continuando* in trespass is impossible, and entire damages, the Court will intend that nothing was given for the *continuando*, because impossible. Entire damages.

Anonymous.

Case 52.

IN TRESPASS, the declaration was without *vi et armis*. Upon general demurrer, this omission is fatal, for it is substance and alters the entry of the judgment, which ought to be with *vi et armis*. Trespass without vi et armis ill.
2 *capias* when the action is *vi et armis*, otherwise with a *miseri-*
cordia.

Bush against Cole.

Case 53.

IN COVENANT, the plaintiff declared, that he leased to A. a house for years, excepting two rooms, with free ingress, egress, &c. *per le parlour*, hall, &c. and afterwards the lessee assigns to the defendant, and alleges breach, because the defendant had stopped the passage ; and on demurrer, that these words do not make a covenant, for they are only the words of the lessor, and not like *dimise* : " for there the use of a pump was leased by him against whom the covenant was brought, but here they are the words of him who brings covenant ; and if covenant lies, it is not maintainable against the assignee. " An exception of a passage in a lease, being not part of the thing demised, but dehors, amounts to a reservation, and covenant will lie.

But PER CURIAM, Covenant lies against the lessee and assignee too ; for it is expressly laid, that the demise was to him and his assigns.

* And EYRE, Justice, said, the diversity was as taken in *Lord Russell's Case*, where the demise was of land, except a close ; and agreed, that covenant did not lie for disturbance in this close ; but where the exception was of a thing *dehors* to the lessor, as a way, common, estovers, or other profit *aprender*, that is by agreement of the lessee, the lessor shall have them ; and therefore covenant lies. 3. Cro. 657. *Mds* 553.

Burges

S.C. Carth 232.
S. C. 1. Salk.
196.
S. C. 1. Show.
388.
1. Lev. 47.
1. Ch. Caf 254.
2. Mod. 86.
Dougl. 765.

* [25]

Easter Term, 4. Will. & Mary, In B. R.

Cafe 54.

Burges *against* Steer.

Common laid for sheep and found for cows also good, for they are distinct. **PRESCRIPTION FOR COMMON FOR SHEEP.** The jury find, he had common for sheep *prout* he declared, and *ulterius dicunt* he had common for cows too; and moved, that the verdict did not warrant the prescription, because entire; and another is found than that on which the plaintiff declared.

S. C. 1. Show.

347.

S. C. 4. Mod.

89.

S. C. Carth. 419.

Vide Hob. 209.

10. Mod. 300.

Cowp. 766.

Bull. N. P. 59.

2. Burr. 440.

But **PER CURIAM**, The common is several, distinct, and different, for he that prescribes for sheep cannot therefore prescribe for cows.

And **HOLT**, *Chief Justice*, cited *Johnson and Thoroughgood's Case*, *Brown*, 177, 178. which is the very case in point.

Judgment was given for the plaintiff.

TRINITY

TRINITY TERM,

The Fourth of William and Mary,

I N

The King's Bench.

Sir John Holt, Knt. Chief Justice.

Sir William Dolben, Knt.

Sir William Gregory, Knt.

Sir Giles Eyre, Knt.

} *Justices.*

Sir George Treby, Knt. Attorney General.

Sir John Somers, Knt. Solicitor General.

* [26]

* Culliford *against* Blanckford.

Case 55.

DEBT FOR FOURPENCE by the plaintiff, a third person, against the defendant, *Mayor of Dorchester*, upon the statute of 23. *Hen. 6. c. 14.* for falsely returning *Sir R. Nap.* to be duly elected member of parliament, whereas *Sir T. T.* was duly chosen.

Suit commenced by *latitat* for a false return of a member of parliament is a good commencement of a suit. By three Judges, *contra Holt*, Chief Justice.

The *posita* was stayed on two questions that arose at the trial.
FIRST, Whether the plaintiff was a common informer within the statute of 31. *Eliz. c. 5.* and so obliged to commence his suit within a year? for the return was made the third of *March*, in the second year of *William and Mary*, and the *latitat* taken out the twelfth of *February* the same year, but the bill not filed till the third of *April*, in the third year of *William and Mary*.

S. C. 4. Mod. 129. S. C. 1. Show. 353. S. C. Comb. 194. S. C. Carth. 232. S. C. Hutt., 522.

SECONDLY, Whether the suit commenced by the taking out of the *latitat*? For if so, the action was brought within the year.

EYRE and GREGORY, *Justices*, as to the first, were of opinion, that the plaintiff was no common informer within 31. *Eliz. c. 5.* because by 23. *Hen. 6.* the penalty is wholly given to the party grieved, or, in his default, to him that will sue for it; and 31. *Eliz. c. 2.*

Trinity Term, 4. Will. & Mary; In B. R.

COLLINGS
against
BLANCHFORD.

c. 2. extends only where it is given to the king, or to the king and informer; but where it is given to the party only it is *casus omisus*, and remains as at common law; and so is *Noy, 71*; in the case of the party grieved, and the action be brought *tamquam*, yet it is only to have a *capiat*; and if the party had died, the king could not proceed, as he may do when the penalty is given to both.

DOLBEN, *Justice, dubit.*

HOLT, *Chief Justice*, was of opinion, that he was a common informer within the statute; for this is a popular action, and the penalty to him that will sue.

* [27]

1. Vent. 28.
3. Burr. 1247.
1423.
1. Bl. Rep. 312.
Doug. 315.

* As to the second, EYRE, GREGORY, and DOLBEN, *Justices*; The *latitat* being taken out within the year, the suit was sufficiently commenced; and they compared it to the case, where the statute of Limitations is pleaded; the plaintiff may reply, that he purchased a *latitat* within the time, *ea intentione* to declare in the action, 1. *Sid.* 53; and this shall save his being barred.

HOLT, *Chief Justice*, agreed that case, because it was to save an old right of action vested, but he knew never an instance where suing out a *latitat* did save a limitation of an action of debt upon a penal statute; but the time of commencement ought to be reckoned from filing the bill. Besides, there was no need of suing by bill for such penalty, but it might have been by original.

But, notwithstanding, judgment was given for the plaintiff by the other three. *Hall and Wymark's Case (a)*.

(a) See S. C. 4. Mod. 130, *note*.

Case 56.

The King and Queen against Prat.

The master of an apprentice in husbandry dies, the justices at the sessions order his executors to keep him, quashed; and said, perhaps covenant might lie against the executors.

S. C. Salk. 66.
S. C. 1. Show.
405.
Comb. 224.

A MAN took an apprentice in husbandry according to 5. *Eliz.* c. 2. who died before the time of service was expired; and the apprentice being impotent and a cripple, the justice of peace, by order of sessions, sent him to the executor, and ordered him to keep him.

And it was quashed, because the inconvenience would be great if the executor should be forced to obey it; for perhaps he has not assets; and it cannot be tried whether he has or not upon a proceeding at sessions (a). Besides, the executor may be in another county, and then cannot be charged with this order,

And per EYRE, *Justice*, An apprenticeship is a personal trust between master and servant (b), and is determined by the death of either (c), because the end and design of it cannot be obtained; for the executor may not understand the trade in which he is to be instructed. Perhaps an action of covenant may lie against the executor

(a) *Rex v. Earnes*, 1. *Str.* 48.
(b) *Baxter v. Benfield*, *Const's P. L.*
vol. i. 513. *Rex v. Eaking*, *Burr. S. C.*
320.

(c) See now 32. *Geo.* 3. c. 57. &

cutor

Trinity Term, 4. Will. & Mary, In B. R.

ator upon the contract of the testator ; but there he may make his defence by pleading " no assets ;" and therefore this case differs from 1. Sid. 276.

THE KING
AND QUEEN
against
PRAT.

* [28]
Case 57.

The King against Glide.

MANDAMUS to restore *Glide* to his place of alderman of *Exon*. They return, that *Exon* is an antient city, and that time, &c. there has been a court held, * consisting of eight aldermen and ten others, who were the chamber and common-council of the said city, who used to meet on due summons for the better government of the corporation ; and that for misdemeanors in the aldermen this court used to amove them ; that *Glide* was chosen an alderman, and by virtue of that office was a justice of peace in the said city, but that he removed himself and his family from the said city to *Topham*, *et præd. civitatem deseruit et reliquit* ; by which he neglected the duty of his office, and came not to several councils there held, and declared he would never come more ; and for these reasons, at a court held, of which he had notice, and *licet summonitus fuit* he did not appear, they disfranchised him.

Alderman removed for abs-
enting himself
from the city,
and not attend-
ing, *licet summo-
nitus* ; held well
by three Judges,
contra Holt, J.,
Chief Justice,
who held a par-
ticular summons
was necessary.
S. C. post. 251.
S. C. 1. Show.
364.
S. C. Comb. 197.
S. C. Holt, 169.
435.
S. C. 1. Ld. Ray.
223.
Dougl. 149.
Cowp. 503.

EYRE, Justice. No peremptory *mandamus* shall go, because he being an alderman, and having removed his habitation from the city, has given good cause of disfranchisement ; for it is incident to the place and duty of an alderman to assist in the government of the city, and to be resident there to that purpose. Besides, an alderman's place is not a place of profit, but all the advantage of it consists in freedom, precedence, and authority ; and if he remove himself from thence, he is incapable of enjoying these privileges. *Et quod deseruit et reliquit* is a sufficient return ; although it do not appear but he might have returned again, this could not purge his offence and forfeiture, but he continued still removeable for it : as if tenant for life make a feoffment in fee on condition, and enter for condition broken before the lessor takes advantage of the forfeiture, yet this does not purge it. But as to his saying he would return no more, this would not help the return, because no obstacle to his coming again ; but he must have been summoned before they disfranchised him ; but being removed thence, no summons is necessary.

GREGORY, Justice, accord. in omnibus ; adding, that if *Glide* had declared his resolution of not coming again to the mayor, it would be a disfranchisement.

DOLBEN, Justice. The cause of disfranchisement had been good if well returned ; but he said, *quod deseruit et reliquit* generally was not good, without any allegation that he never returned again ; for if he returned before the disfranchisement, it would be a sufficient cause to prevent it ; but it being returned, that he came not to court according to summons, this makes the return full.

* **HOLT, Chief Justice.** I agree that his absence, &c. was a good cause to disfranchise him ; but here is no sufficient summons re- turned,

* [29]

Vide 1. Sid. 14.

Trinity Term, 4. Will. & Mary, In B. R.

TAKING
against
GLIDE.

Vide postea,
Hil. 7. Will. 3.
Fletcher v. In-
gram.

turned, for he ought to be summoned to answer his faults before disfranchisement (a). It is true, it is alledged that *licet summonitus* he did not attend ; but a general summons will not avail, for they cannot, when they have him in court, object and deprive him for any misdemeanor, but the summons to this purpose ought to be particular, to answer to such and such faults. But if it appear, that he was not an inhabitant within the city at the time of the court held, there is no need of averring a summons ; yet though he left his habitation, yet possibly his return might cure his default before ; and if he does return, and they did not summon him, he could not be deprived ; for perhaps he could have alledged some good cause for his departure, as sickness, which might have satisfied the court ; for the difference is, where they might have an opportunity of summoning him, and where not ; and this being a return ought to be certain to every particular, because the party has no answer to it ; but it might have been good in an action on the case, where he might have replied to it. 3. *Bulst.* 189. 1. *Roll.* 409. It was returned to a *mandamus*, that thirty of the common-council, in the council-chamber assembled, removed the plaintiff ; and this was ruled to be ill, because it was not alledged, that the common-council was held for this purpose ; for the common-council might have come to a feast, and not as a court. So in this case, though *Glide* left the place, yet there being a possibility of returning again before disfranchisement, and upon such a return a summons being necessary before he could be removed, and it not appearing on the record that he did not return, the disfranchisement must be taken to be naught.

But on the opinion of the other three, no *peremptory mandamus* was granted (b).

(a) See *Rex v. Heaven*, 2. Term Salk. 428. 5. Mod. 254. 257. *Rex v. Rep.* 772. *Lync Regis*, Dougl. 149. 160.
(b) *Rex v. Chalke*, 1. Ld. Ray. 225.

MICHAELMAS

MICHAELMAS TERM,

The Fourth of William and Mary,

IN

The King and Queen's Bench.

Sir John Holt, Knt. Chief Justice.

Sir William Dolben, Knt.

Sir William Gregory, Knt.

Sir Giles Eyre, Knt.

} *Justices.*

Sir George Treby, Knt. Attorney General.

Sir John Somers, Knt. Solicitor General.

* [30]

* *Williams against Salisbury.*

Case 58.

THE want of *cur. hic prolat.* helped after verdict by the statute *hic prolat. help-*
of *Oxford, presert hic in cur. literas administratorias.* ed by verdict.
Form after verdict, but substance on demurrer (a).

(a) See Hobart, 233. and the case of Morley v. Vivian, post. 38.

Anonymous.

Case 59.

SPECIAL BAIL but discretionary in covenant.

Anonymous.

Case 60.

HOLT, *Chief Justice.* If a plaintiff bring error of judgment for the defendant, it is reviving the first action; and then it is proper for the Court to give such a judgment as he should have had below: but if the defendant bring writ of error, it is only to be discharged.

The

Michaelmas Term, 4. Will. & Mary, In B. R.

Case 61.

The King *against* Hicks.

Information for
using a trade,
not being seven
years apprentice
thereto, must be
brought in the
proper county.

S. C. 1. Salk.

373.

S. C. 4. Mod.
158.

S. C. 3. Salk.
350.

* [31]

Postea, Mich.

10. Will. 3.

Clayton v. Ky-
naaston, 3. Lev.

71. contra.

INFORMATION on 5. *Elix.* c. 4. for not being an apprentice for seven years, brought in the court of king's bench, though the trade was used in *Yorkshire*.

PER CURIAM. It does not lie; though it was objected, that it was not brought by a common informer; and where debt was brought upon a penal statute, **HALE** held it maintainable (a); for the statute of 21. *Jac.* 1, c. 4. not only enacts, "that all offences against a penal statute, for which an informer may ground any actions, bills, &c. before justices of assize, &c. shall be sued before justices of assize, &c. of the county where such offences * are committed;" but also, "that all informations, &c. sued at *Westminster* for such offences shall be void;"

DOLBEN, Justice. It was adjudged by **HALE**, that debt did not lie, though it was doubted by him.

HOLT, Chief Justice. It was adjudged in the exchequer-chamber, that debt did not lie in *Westminster-Hall*, upon a penal statute for an offence in another county, in a case where he was of Counsel (b).

(a) In the case of *Barnes v. Hughes*,
3. Vent. 8.

(b) See *Shipman v. Henbest*, 4. Term
Rep. 109.

Case 62.

The King and Queen *against* Portington.

Superstitious
uses void; and
though by 1.
Edw. 6. given
to the king,
that does not
extend to future
ones.

EJECTMENT upon a superstitious use.—**HOLT, Chief Justice.** The statute of 23. *Hen.* 8. c. 10. makes superstitious uses void, but does not give them to the king (a). The 1. *Edw.* 6. c. gives to the king, but does not extend to future uses since. Wherefore it would be convenient for the heir to seek remedy in parliament, according to *Mo.* 784.

S. C. 1. Eq. Abr. 96. S. C. 1. Salk. 162. S. C. 3. Salk. 334.

(a) See *Amb.* 228. and the statute 9. *Geo.* 2. c. 36.

Case 63.

Ball *against* Briggs.

Escape.

Vids 3. Co.

DEBT UPON AN ESCAPE. The defendant pleads fresh pursuit and re-taking of the party the same day the bill was filed; and adjudged no plea, the action being once attached in the plaintiff. 1. *Jo.* 145.

HILARY

HILARY TERM,

The Fourth of William and Mary,

I N

The King and Queen's Bench.

Sir John Holt, Knt. Chief Justice.

Sir William Dolben, Knt.

Sir William Gregory, Knt.

Sir Giles Eyre, Knt.

} *Justices.*

Sir George Treby, Knt. Attorney General.

Sir John Somers, Knt. Solicitor General.

* [32]

* *Symonds against Cudmore.*

Case 64.

TENANT IN TAIL of a reversion expectant upon a lease for years, with the reversion in fee to the same tenant in tail, makes a future lease, and dies; the issue, before the commencement of the future lease, levies a fine.

The question was, Whether the conusee should avoid the lease?

Eyre, Justice. He shall not: The lease is not void, but voidable: it takes hold of the estate-tail, and charges it after the determination of the first lease, and by possibility might have begun during the tenant in tail's life; though it would have been void if made to commence after his death; because it should not have issued out of the tenant in tail's estate, but the issue's: but now as this stands, it is only voidable (*a*).

But supposing the lease to be void as to the issue, yet neither he nor the conusee can avoid it; not the issue, because barred by fine; nor the conusee, for the lease issues out of both the estates which passed to him by the fine (*b*). Where the king, tenant in tail, with reversion expectant, grants the land in tail, if it were the case of a common person, held it should operate on both estates (*c*). The rent issues out of all the estate, according to the rule in 5. Co. 17. b. and rather than the lease should be void, it shall issue both out of the

If a tenant in tail, remainder to himself in fee, make a lease for years to commence in future, and die before the commencement of the term, and the issue levies a fine, the lease is good against the conusee.

S. C. 4. Mod. 1.
S.C. 1. Salk. 338.
S. C. 1. Show.
370.
S. C. Skin. 284.
317. 328.
S.C. 3. Salk. 335.
S.C. Carth. 257.
S. C. Holt, 666.
S. C. 1. Freem.
503.
Cruise on Fines,

1. Jones, 60. Bridg. 27. 1. Roll Abr. 843. 2. Atk. 204. 3. Bac. Abr. 324.
275. 4. Brown's P. C. 594. Cowp. 379.

(*a*) Co. Lit. 46. Cro. Eliz. 718.

(*c*) 1. Cro. 103. Hutt. 96.

(*b*) 1. Co. 47.

VOL. XII.

D

reversion

SYMONDS
against
CUDMORE.

* reversion in tail and remainder in fee; now the tail is extinguished, and the conusee is seised of a fee only, and so the lease unavoidable, as derived out of it. And that the fine consolidates both estates, and utterly extinguishes the tail, as to issue, is proved, 2. *Leo.* 37. 3. *Co.* 51. b. 1. *Cro.* 478. *Hob.* 258. 323.

And ALL THE WHOLE COURT held with him in the second point.

HOLT, *Chief Justice*, and GREGORY, *Justice*. The lease is not void, not on tenant in tail's death, for if it were, no after-act could make it good, 1. *Roll.* 260. ; but it may be made good. So is *Bridgman*, 28. *Dyer*, 46. 2. *Bulst.* 44. And therefore the issue has election to avoid it by entry, or make it good by acceptance of rent ; and the issue, if he had stayed till the lease was out, might have avoided it ; but the conusee shall not have that privilege, because none but privies in blood shall avoid such lease.

DOLBEN, *Justice*, accorded in omnibus ; and said, *Siderfin* was mistaken in the report of *Oyus and Thomasius's Case*, as to time and true stating.

HOLT, *Chief Justice*, agreed to the judgment, but differed in some things ; and said, if the lessor and conusor had been seised of a reversion only, he should have been of opinion for the plaintiff, that the lease was void ; for if a tenant in tail make a lease at a day future, and dies before commencement, it is void at the election of issue. FIRST, Because the future interest is no estate until actual entry, and until then tenant in tail is seised, for before such lessee has only a right (a). And entry being necessary to a title, it is defeated by the tenant in tail's death ; and if the lessee afterwards enter, the heir may have trespass against him (b). It is held to be a void lease, not because it issues out of the estate of the issue only, for it charges the whole tail ; but the true reason is, because the lessee has no title to enter until possession devolved to the issue, who has a precedent and paramount right ; and be there a possibility of commencing during the tenant in tail's life, who is lessor, and it does not commence, or be it limited to commence after his death, the lease is void to charge the possession of the issue. SECONDLY, Where tenant in tail makes a future lease, there is no act appointed by law by which the issue can avoid it until after the tenant in tail's death ; and after his death, he can neither enter nor make claim, or bring action, which are the only ways of defeating an estate ; yet there is none of them necessary to prevent such vesting. Therefore the *interesse termini* is void as to the possession of the issue, who has power to avoid it. And he compared it to the case in 4. *Co.* 53. 1. *Inst.* 218. feoffment in fee, on * condition to pay a sum of money at a day certain ; afterwards the feoffee makes a lease of the land to the feoffor, and does not perform the condition, the fee shall be adjudged immediately in the feoffor ; for he could not enter, and need make no claim, because in possession ; and there would be a circuitry if the law were

Vide tamen
1. *Inst.* 185. a.
186. b.

Hilary Term, 4. Will. & Mary, In B. R.

otherwise, for the issue must permit the lessee to enter, and then oust him ; and besides, this lease was made by a tenant of a reversion : then suppose he had granted over a reversion and died, the grant would have been void until the issue had done some act to confirm it (a). And if it shall be so in the case of a grant of inheritance, *a fortiori* in the case of a lease.

SYMONDS
against
CUDMORE.

Now the fine levied does not corroborate the lessee's estate, nor is there any election in the issue. First, Because the time of his election was not come, which was not to have been until after the commencement of the lease. Secondly, When a thing or estate is or is not at the election of any person, the levying of a fine shall not extinguish the election, but only convey the estate (b). And there is a difference between a power to make a lease good, and an election to make it good or void ; but when the conusee has, by acceptance or distress, affirmed the lease, he shall be concluded to say the conusor was issue in tail ; which was first held *Plowd.* 437. And in another age, *Coke* was of the same opinion (c). But there being no such act in this case, if this had been the point only, judgment ought to have been for the plaintiff.

(a) *Litt. f.* 608. 3. Co. 84, 85.

(c) Co. Lit. 47. 2. Roll. Abr. 190.

(b) 1. Cro. 302.

Bondler *against* Orabb.

Case 65.

A MISTAKE of a clerk through carelessness in an inferior court is amendable, but not if through want of skill. Amendment.

Can *against* Cary.

Case 66.

WHERE an agreement is at land, and a performance is at sea, it shall be tried where the agreement is made : and saying *Raym.* 3.
in partibus transmarinis infra paroch. is idle.

E A S T E R T E R M,

The Fifth of William and Mary,

I N

The King and Queen's Bench.

Sir John Holt, *Knt. Chief Justice.*

Sir William Dolben, *Knt.*

Sir William Gregory, *Knt.*

Sir Giles Eyre, *Knt.*

Sir George Treby, *Knt. Attorney General.*

Sir John Somers, *Knt. Solicitor General.*

} *Justices.*

* [35]

Case 67.

* Anonymous.

In what case title must be set forth.

Yelv. 147

Poph. 1. Salk.

HOLT, *Chief Justice.* Where a common or a way is claimed, the title ought to be set forth in the declaration; but for a fair or a franchise, which is no charge to another's soil, there *habere debuisse* is good, without further.

335. 4. Mod. 424. 1. Stra. 5. Comy. Rep. 7. 5. Com. Dig. "Pleader" (C. 39.).

Case 68.

Anonymous.

Oyer must be craved of an original.

Tidd Prac. 343.

HOLT, *Chief Justice.* One cannot take advantage of an original, though never so vicious in recital, without craving *oyer* of it.

Case 69.

Hicks against Harris.

Suit in the spiritual court to annul an incestuous marriage,

pending which one of the parties dies, prohibition shall go as to annulling the marriage.—S. C. 2. Salk. 548. S. C. 4. Mod. 182. S. C. Carth. 271. S. C. Comb. 200. T. Jones, 213. Stiles, 10. 2. Vez. 245.

MOTION against a rule for a prohibition granted on a sentence in the spiritual court about an incestuous marriage, to declare it null and void after the death of one of the parties (*a*).

prohibition shall go as to annulling the marriage.—S. C. 2. Salk. 548. S. C. 4. Mod. 182. S. C. Carth. 271. S. C. Comb. 200. T. Jones, 213. Stiles, 10. 2. Vez. 245.

(*a*) *Harris*, after the death of his wife without issue, married her sister, by whom he had several children. He was libelled in the spiritual court for this incestuous marriage, and pending the suit his wife

died; but, notwithstanding this event, the Court proceeded in the suit, and declared the marriage to be void.—S. C. 4. Mod. 182.

HOLT,

Easter Term, 5. Will. & Mary, In B. R.

HOLT, *Chief Justice*. The reason of the sentence is to prevent their living in incest, and there is no occasion for it here. Then the party might have disproved the evidence, if alive. They cannot give a sentence to bastardize the issue, that is only by consequence; and if they incroach on common law, though they have original consanguinity, we will prohibit.

Hicks
against
HARRIS.

And a prohibition *quoad* to declare the marriage void was granted.

* [36]

• De La Bastile against Reignald and his Wife.

Case 76.

IN a *hominis replegiando*, on the issuing of THE WRIT the defendant entered an appearance before the return of the writ with the filazer. The sheriff returned *elongavit*; upon which a *withernam* was awarded.

In a *hominis replegiando*, where the party appears on the day process is returnable and pleads *non cepit*, there is no need of bail, and a *superfedeas* shall go to the *withernam*, S. C. Carth. 286. S. C. Comb. 200. 4. Mod. 183. Skin. 337. Co. Lit. 135. Postea, Misch. 12 Will. 3. More v. Watts.

A *superfedeas* was moved for, because appearance was entered, and offered to plead *non ceperunt*.

And they said, wherever an *elongavit* is returned, and the defendant offers to appear and plead *non ceperunt*, it shall stay the *withernam*, because the end of the writ is only to bring in the defendants to appear and plead.

And this the other side agreed to; and only prayed, that the defendants might *gage deliverance* before it was granted.

HOLT, *Chief Justice*. There is no difference between a *replevin* and a *hominis replegiando*; for as the sheriff can return nothing but an *elongavit*, where he cannot find the thing to be replevied in one case, so neither can he in the other. And as to *gaging deliverance*, he held that was to be done by the plaintiff only where the thing is replevied,

It was then moved, that the defendant should find bail.

But HOLT, *Chief Justice*, Where the party appears on the day process is returnable, and pleads *non cepit*, there is no need of bail.

Wherefore, PER CURIAM, a *superfedeas* to the *withernam* was granted without bail.

Hodges against Steward.

Case 71.

CASE upon a bill of exchange. The plaintiff declared on the custom of London, that where one merchant draws a bill on himself, payable to another or bearer, and the person to whom it is payable indorses it to a third man, the indorsee, on refusal of payment, may bring an action against the drawer; and says, the defendant drew such a bill to F. who assigned it to the plaintiff, *unde accrevit*, &c.

A bill of exchange payable "to A. or bearer" is not assignable. S. C. 1. Salk. 125. S. C. 3. Salk. 68.

S. C. Skin. 346. S. C. Comb. 204. 1. Ld. Ray. 181. Postea, Pasch. 22. Will. 3. Carter v. Palmer, acc.

Easter Term, 5. Will. & Mary, In B. R.

HOPKINS
against
SEWARD.

PER CURIAM. There is a difference between a bill payable "to J. S. or bearer" and a bill "to J. S. or order (a)"; and one is not assignable by the contract, the other is: there is no authority given to assign by the one, by the other there is (b).

SECONDLY, This is a good bill between the indorser and the indorsee, for the indorsement is in nature of a new bill.

THIRDLY, Though there is no averment of the defendant's being a merchant at the time of drawing the bill, yet the drawing the bill was a sufficient trading and negotiation to this purpose.

And **HOLT, Chief Justice**, cited the case of *Sarsfield v. Witherley* (c): Action against *Witherley* upon a bill of exchange; he pleaded that he was not a trader, but a gentleman sent into France to travel, and for convenience of a return drew this bill, &c.; and judgment was given for the defendant in the king's bench; but it was reversed in the exchequer chamber, because his drawing a bill made him a trader within the custom of merchants as to a bill of exchange.

FOURTHLY, The plaintiff having declared on a special custom, for a bearer to have an action, and the defendant having demurred instead of traversing it, though in truth there be no such custom, has confessed it.

And so judgment was given for the plaintiff. For though the Court shall take notice of the law of merchants, and if an action had been brought upon it, that demurrer would not have concluded the Court to give judgment for the plaintiff, or forced them to determine a thing otherwise than the law directs, yet they cannot take notice of customs of particular places (d); and the custom in the declaration being sufficient to maintain an action, the defendant by confessing it by demurrer has given judgment against himself.

Indebitatus assumpsit will not lie on a bill of exchange.

Hard. 486, 487.
1. Vent. 152.
1. Mod. 285.
5. Term Rep. 483.

FIFTHLY, A general *indebitatus assumpsit* will not lie upon a bill of exchange for want of consideration; but a bill is but evidence of a promise, and so but *nudum pactum*; and therefore he ought to bring a special action upon the case, upon the bill and custom of merchants, or else a general *indebitatus assumpsit* for money received to his use (e).

(a) See *Nicholson v. Sedgwick*, 1. Ld. Ray. 180.

(b) Both bills of exchange and promissory notes payable to bearer are negotiable. See 3. & 4. Anne. c. 9. *Hinton's Case*, 2. Show. 34. *Grant v. Vaughan*, 3. Burr. 1516. *Miller v. Race*, 1. Burr.

452. *Minet v. Gibson*, 3. Term Rep. 481. 1. H. Bl. Rep. 569. *Kyd on Bills*, 19. 35.

(c) 1. Show. 125. *Comb.* 45. 152.

(d) 1. Will. 9. *Stra.* 1187.

(e) See 1. Burr. 373. and *Kyd on Bills*, 114.

Case 72.

Davy and Nichols against Smith.

If a testator might see the witnesses subscribe, it is a subscription in his presence.—S. C. 3. Salk. 395.

AT A TRIAL upon a feigned issue in *assise*, directed by THE HOUSE OF LORDS, concerning a will made of lands by J. S.

The

Easter Term, 5. Will. & Mary, In B. R.

The question was, Whether the witnesses to the will had pursued the direction of the statute 29. Car. 2. c. 3. of Frauds and Perjuries, in subscribing their names ?

DAVY AND
NICHOLS
against
SMITH.

And *PER CURIAM*, If the testator lay in a bed in one room, and the witnesses went through a small passage into another room, and there set their hands at a table in the middle of the room, and opposite to the door, and both doors open, so that the testator might, if he pleased, see them, though no proof he did see, it is sufficient within the statute ; and therefore he said, if witnesses subscribe in the same room where a testator lies, but the curtains of the bed are drawn, this is a good subscription ; and because it is in the power of the testator to see, it shall be construed to be in his presence (a).

(a) By 29. Car. 2. c. 3. " All devises and bequests of any lands or tenements shall be in writing, and signed by the party so devising the same, or by some other person in his presence and by his express direction, and shall be attested and subscribed, in the presence of the said devisor, by three or more credible witnesses, &c. " The words in the preface have been held as synonymous to within the vicus. *Sheets v. Claffcock*,

Salk. 688. Carth. 81. Eq. Caf. Abr. 403. Eccleston v. Petty, 1. Show. 89. Broderick v. Broderick, 1. Peer. Wms. 259. Machel v. Temple, 2. Show. 288. Longford v. Eyre, 1. Peer Wms. 740. Right v. Price, Dougl. 241. Capon v. Dade, 1. Brown's C. C. 99. Dormer v. Thurland, 2. Peer. Wms 509. Stonehouse v. Evelyn, 3. Peer. Wms. 254. Gryle v. Gryle, 2. Atk. 176. Carleton v. Griffin, 1. Burr. 549.

* [38]

* Opy *against* Adifoa and Others.

Case 73:

MOTION to discharge a rule for prohibition to THE COURT OF ADMIRALTY, in a suit for *mariners wages*, upon suggestion of a contract in writing made for them at land.

Mariners wages
suable in the
admiralty court
if by parol ;
aliter if by a-
greement under
seal.

FIRST, Because they have a jurisdiction.

And *PER CURIAM*, It is allowed, and nothing but constant practice affirms it ; but if there be a special agreement that mariners shall receive wages in any other manner than usual, or if the agreement be under seal, in both these cases prohibition shall go (a) ; but where it is in writing only, it is but a parol agreement, and therefore they have power, as here.

S. C. 1. Salk.
31.
Vide postea,
Trim. 12. Will 3.
Clay v. Snell-
grave.
Conset on
Courts, 422.
2. Will 264.
2. Stra. 968.
3. Term Rep.
267.

SECONDLY, They said, there was no libel, then there could be no prohibition.

But *PER CURIAM*, If there be a citation, and the ship arrested, though no formal libel, it is sufficient (b).

But on the first matter the rule was discharged.

(a) See *How v. Napier*, 4. Burr. 1950. *Day v. Searle*, 2. Stra. 968. *Boss v. Parr*, 2. Ld. Ray. 1209. *Mcne-
tune v. Gibbons*, 3. Term Rep. 267.

(b) This was said to be otherwise, by

the Court, upon a motion made by *MONTAGUE*, in the case of *Barr v. Barr*, in the king's bench, in *Michaelmas Term*, in the fourth year of *Queen Anne*.—NOTE to the former edition.

Easter Term, 5. Will. & Mary, In B. R.

Cafe 74.

Morley *against* Vivian.

Vide ante, page 30.

ET HOC PARATUS EST VERIFICARE held to be only form ; and though it has been held substance, yet subsequent opinions have been contrary.

Cafe 75.

Davis *against* Speed.

Husband seised in right of his wife covenants with her to levy a fine to the use of the heirs of his body on her begotten ; the limitation is void.

S. C. Holt, 730.

S. C. 4. Mod.

253.

S. C. Salk. 675.

S. C. Skin. 351.

S. C. Carth. 162.

S. C. Show.

Parl. Ca. 104.

Fearne, 409.

(210).

4. Com. Dig.

"Estates"

(B. 14.).

6. Com. Dig.

"Uses" (B. 2.).

(K. 7.).

* [39]

EJECTMENT. Husband and wife, seised in fee in right of the wife, levied a fine to *J. S.* and his heirs, to the use of the heirs of the body of the husband, begotten of the wife, and for want of such issue, to the right heirs of the husband : the wife dies ; the husband dies without issue.

The question was, Who should have the land, the lessor of the plaintiff as heir to the husband, or the defendant as heir to the wife ?

DARNELL for the plaintiff. A particular estate arises to the husband by implication, though this be not a covenant to stand seised, like *Pibus and Misford's Case*, *Mod. Rep.* 122. 159. where the estate for life arose out of the old estate of the covenantor new-moulded ; and to the purpose, 1. *Roll.* 240. 1. *Inst.* 22. *b.* that an estate should be raised to the husband by implication ; but those cases are of conveyances made by him who had the estate before ; but * in this case, the husband had no estate before, but all was in the wife ; but notwithstanding he said, that the husband having power to declare the uses of the fine, and perhaps having issue at that time, and by that intitled to be tenant by the curtesy, he might not think it necessary to make a limitation to himself. But supposing he shall have no use by implication, yet he shall have a remainder as a springing use ; and there is no need of a freehold to support such remainder. 1. *Lev.* 101. *Mo.* 720. But the feoffees have a *scintilla juris* to execute it when it comes.

NORTHEY contra. There is no alteration made by the fine, but the wife is in of her old estate, there being no person to take a freehold in possession. Such an estate might not be good at common law ; but since the statute of 27. *Hen.* 8. c. 10. uses must be subject to common law, and no fractions can be made in an estate settled to use. 3. *Cro.* 334. 2. *Rastah*, 797. 1. *Cro.* 321. And the case in the *Modern Reports* is not like this ; for that was a covenant to stand seised, and this is by transmutation of possession ; and there is no estate left in the feoffee or conusee, but only a possibility to serve future uses. 1. *Co.* 157. The notion of a springing use has been set up to set a fee upon a fee ; but it was never known that the first use was a springing use.

HOLT, Chief Justice. The first use may be a springing use ; for if I bargain and sell to the use of another five years hence, this is a good future use ; there is a difference between a covenant to stand seised and a feoffment to use ; for until the contingency happens,

Easter Term, 5. Will. & Mary, In B. R.

happens, or the time comes for the future use's rising, it shall return again to the feoffor. A feoffment to the use of the right heirs of J. S. after the death of J. S. is a future use; but if it were limited to rise after the death of one without issue, this is void, without a particular estate to support it. So is *Pell and Brown's Case*, unless the dying without issue be within a certain term, as within the life of a man; for otherwise the law will not expect the vesting of it, but will construe the limitation to be void, because the possibility is foreign: *Holcroft's Case* in *Moor* is express.

DAVIS
against
STEEB.

Postea, Pasch.
6. Will. 6. Mary.
Goodright v.
Cornith.
Postea, Pasch.
11. Will. 3.
Scattergood v.
Edges.

Judgment for the defendant (a).

(a) A writ of error in parliament was brought, and the judgment affirmed. Show. C. P. 104.

The King against Knowles.

Case 76.

INDICTMENT against *Gb. Knowles, Esq.* for murder. Mif-
nomer pleaded, and prays to amend something in the plea.

S. C. post. 55.
S. C. 1. Salk. 47.
S. C. 2. Salk.

HOLT, Chief Justice. You cannot amend, for it is in parchment, and so a record; but when in paper, it is only a warrant to make a record by.

509.
S. C. 3. Salk.
242.

EYER and DOLREN, Justices. No difference between being in parchment and paper; and therefore amended.

S. C. Comb. 273.
S. C. Carth. 279.
S. C. Skin. 336.
517.

S. C. Trem. 11. S. C. 1. Ld. Ray. 10. S. C. 8. St. Tr. 50. 58. Ante, page 20.

* [40]

* Anonymous.

Case 77.

PRESCRIPTION for a pew in a church by reason of his house; affidavits made "that he was no inhabitant there, nor is a pew.
"an inhabitant," are not sufficient; for possession only is enough, without living there (a).

3. Lev. 73.
1. Burr. 440.

(a) But see *Stocks v. Booth*, 1. Term Rep. 431, *notis.* *Griffith v. Mathews*, Rep. 428. *Rogers v. Brooks*, 1. Term 5. Term Rep. 297.

Anonymous.

Case 78.

IF one employ another to manage business for him, though no sworn attorney, the party himself cannot take advantage of it.

Anonymous.

Case 79.

HOLT, Chief Justice. There ought to be no plea to the jurisdiction of the Court after imparlance, but the practice has been only to make it a *respondeas ouster*. A special imparlance admits the jurisdiction of the Court, though it has been otherwise used.

No plea to the jurisdiction after imparlance.
Raym. 34.

Anonymous.

Easter Term, 5. Will. & Mary, In B. R.

Cafe 80.

Anonymous.

Prohibition to the spiritual court *quoad* answering on oath in a suit for adultery. **M**OTION for a prohibition to the ecclesiastical court in case of adultery, because they obliged the party to answer on oath.

And prohibition was granted *quoad* that, that he should not answer on oath, but proceed as to the rest.

THEN IT WAS MOVED, that there was a temporary penalty for providing for bastard children.

But **CURIA**—We will not grant it, because the ecclesiastical court proceeds only to the punishment of the crime of adultery.

Cafe 81.

Anonymous.

Practice.
Tidd's Prac.
313. 631. 692.

AFTER RULE entered, judgment shall be signed on the eighth day after inclusively in *Hilary* and *Trinity Terms*.

Cafe 82.

Anonymous.

Witnesses.
Kely. 17.
3. Keb. 136.
2. Sid. 237.

WHERE several defendants are in an information, and some of them have not pleaded, the attorney-general may enter a *nonpro* as to them, and they are good witnesses.
Stiles, 401. Saville, 34. 4. Hawk. P. C. 7th edit. ch. 46. § 2.

Cafe 83.

Anonymous.

Rules for signing judgment. **I**F THE PLAINTIFF give rules for signing judgment, and rules are out, and no judgment signed before the effoin-day of next Term, the plaintiff must give new rules.
See Tidd. Prac. 601.

TRINITY TERM,

The Fifth of William and Mary,

IN

The King and Queen's Bench.

Sir John Holt, *Knt. Chief Justice.*

Sir William Dolben, *Knt.*

Sir William Gregory, *Knt.*

Sir Giles Eyre, *Knt.*

} *Justices.*

Sir George Treby, *Knt. Attorney General.*

Sir John Somers, *Knt. Solicitor General.*

• [41]

• Wharton *against* Lisle.

Case 84.

TROVER AND CONVERSION of several loads of flax. On *not guilty* pleaded, the jury found the plaintiff impropiator of a rectory, and the defendant vicar of the same; and that about eight years since flax was first sown within the parish; for the first year the parson had tithes of it, for the last seven the vicar had constantly taken them. They find, that there were *six hundred and sixty acres* sown with corn, and *twenty-six* only with flax; that the vicar was endowed with small tithes.

Tithes of *flax* are small tithes, wherever sown.

S. C. 3. Lev. 365.

S. C. 4. Mod. 183.

S. C. Comb. 201. 209.

S. C. Carth. 263.

S. C. Skin. 341.

359.

S. C. 3. Salk. 349.

1. Roll. Abr. 633.

Cro. Eliz. 467.

Cro. Car. 28.

Hutton, 73.

Wood's Inst. 162.

3. Com. Dig. "Dimes"

(G. 2.).

The question was, Whether flax were great or small tithe?

HOLT, *Chief Justice.* The best way to distinguish tithes is the place where they grow and are sown; for sown in a garden, they are small tithes; if sown in a field, great; and this rule extends to corn, hops, &c.

BUT EYRE, DOLBEN, and GREGORY, *Justices.* The place is not material, but we should only consider the nature of the thing; if corn be sown in a garden, the parson shall have it; if flax in a field, the vicar; but if the greater part of the parish be sown with small tithes, the parson.

For, by DOLBEN and GREGORY, *Justices.* otherwise the principal part would be transferred to the vicar.

But

Trinity Term, 5. Will. & Mary, In B. R.

WHARTON
against
LISLE.

But EYRE, *Justice*, said, in that case he should not have them, unless by usage.

EYRE, *Justice*, took a difference, which was not denied, as to tithes of hemp, ray-grass, &c. ; if they are sowed for seed, the parson shall have them, as of grain : if mowed, as hay, the vicar shall have them, as of herbs (*a*).

(*a*) On a bill in chancery claiming great tithe of potatoes sowed in large quantities in the common fields, HARDWICK, Lord Chancellor, determined, that the quantity makes no difference in the nature of the tithe, and adjudged them to be small tithe, Smith v. Wyatt, 2. Atk. 365. It has also been decided, that a

field sowed with clover, which was cut for hay, is small tithe, Wallis v. Pain and Underhill, Comy. Rep. 633. So also, that the seed of the second cutting of clover is small tithe, Wallis v. Pain, Bunb. 344.—See also Crouch v. Risden, 1. Sid. 443. ; Tilden v. Walter, 1. Sid. 447. ; and the statute 11. & 12. Will. 3. c. 16.

* [42]

Cafe 85.

* Harcourt against Fox.

The clerk of the peace is not removeable by a succeeding *custos rotulorum*, but has a freehold in his office.

S. C. 1. Show. 426. 506 516,
S. C. 4. Mod. 167.
S. C. Comb. 209.
S. C. Show. P. C. 168.
S. C. Holt, 189.
S. C. 1. Ld. Ray. 161.
Ante, 13.

INDEBITATUS ASSUMPSIT ; and *non assumpsit* pleaded. The jury found the statute of 37. Hen. 8. c. 1. and 1. Will. & Mary, c. 21. and the several clauses in them about the clerk of the peace ; that the *Earl of Clare* was *custos rotulorum* of *Middlesex*, and that he named the plaintiff to be clerk of the peace, to exercise the office by him or his sufficient deputy, *quamdiu se bene gesserit* ; that the plaintiff was capable of the office, and duly admitted ; that the *Earl of Clare* was afterwards removed, and the *Earl of Bedford* made *custos rotulorum* ; who constituted by writing under hand and seal the defendant, during the time he was *custos rotulorum*, *quamdiu* the defendant *se bene gesserit* : and on solemn argument judgment for the plaintiff.

EYRE, *Justice*. The plaintiff continues clerk of the peace notwithstanding the *Earl of Clare*'s removal ; but if the plaintiff's title was not good, he shall not take advantage of the limitation of the defendant's title, though that be bad ; *quod DOLBEN, Justice*, agreed. What this office formerly was, cannot be collected ; but from 37. Hen. 8. c. 1. this act was declaratory ; and the thing designed was, that the office should be executed by able persons, and be under the power of the *custos*. That statute not well providing this, the statute of 1. Will. & Mary, c. 21. was made to take him out of the power of the *custos*, and put him under the power of the sessions ; and therefore this statute has several restrictions more than the other. The words of this statute plainly give him an estate for life, *quamdiu se bene gesserit* ; and this is an enacting clause, and excludes the limitation by the former statute, for *expressio unius est exclusio alterius* ; it is penned in an affirmative, which always implies a negative.

GREGORY and DOLBEN, *Justices*, of the same opinion ; and they said, that the words " that the *custos rotulorum* should nominate (*a*) the clerk of the peace, where he found the place void," plainly shews that he does not depend on the *custos*.

(*a*) And this nomination may be by post. 199. Salk. 467. 5. Mod. 386. 1206 without deed, Saunders v. Owen, Carth. 426.

HOLT,

Trinity Term, 5. Will. & Mary, In B. R.

HOLT, *Chief Justice*, of the same opinion. It is to be considered who this officer was; and it is plain, the *custos rotulorum* is no officer time immemorial, because the commission of the peace, to which it relates, is not so; for justices of the peace were not made until *Edward the Third's* time, in lieu of conservators; and the statute which gives them complete power is the 34. *Edw. 3. c. 1.*; and legally, even to this day, they have the power of the records; but * because of inconvenience that might happen, it was in the power of the king to name a particular person for keeping the rolls; and therefore all writs of error and *certiorari* are directed to the justices, but actually the records are in the custody of the *custos*, and he is liable to answer all losses to the king and subject respectively; whence it is plain, no person could be *custos rotulorum* without being a justice of the peace. It was incident to the office of lord chancellor, in the name and stile of the king, to nominate the *custos rotulorum* without warrant or bill signed from the king, as he does at this day in all ordinary administration of justice; as *oyer and terminer*, gaol-delivery, &c. Then comes the statute of 37. *Hen. 8. c. 1.*; and it is thereby provided, "that he shall be nominated by bill signed;" but because of inconveniencies comes the 3. & 4. *Edw. 6.* and restores it again to the lord chancellor, without bill signed. Then comes this statute of 1. *Will. & Mary, c. 21.* concerning the nomination of clerk of the peace, who by the import of the words has an estate for life, of which there had been no doubt if the word "only" had been left out. This act commits the power of the *custos* without respect to his interest, and only as to his possession; and the *custos* having executed the power, by putting in the clerk of the peace, the clerk is now in by the statute and the limitation of it. In this statute the words of 37. *Hen. 8. viz.* "as long as the *custos rotulorum* shall continue," are left out, and the words "as long as the clerk of the peace shall demean himself well" are put in. As to the *custos rotulorum* the statute of 37. *Hen. 8.* is revived, but not also clerk of the peace; if they had intended it should have gone with the *custos rotulorum*, there need not have been any clause put in. The design was to put the clerk of the peace under the power of the justices, who could not displace him before. This statute has made several alterations, and the parliament intended to make a provision, that the sessions should be always furnished with a good clerk; and that he might have encouragement if he executed his office well, gave him so large an estate; and so prevent the inconveniencies which may happen by embezzlement of the rolls, &c. when the clerk is so often removed, and the place held precariously.

Judgment for the plaintiff; and it was afterward affirmed in parliament.

Anonymous.

Cafe 86.

HOLT, *Chief Justice*. An executor may justify payment of a ~~sum~~ when a judgment is suspended by writ of error.

Masters

Vide *Yelv. 29.*
Postea, Mich.
5 Will & Mary,
Anonymous.

Harcourt
against
Fox.

* [43]

Cafe 87.

* Masters *against* Marriot.

S.C. 3 Lev. 363.
S. C. Skin. 347.
S. C. Holt, 26.

WHERE a special request in an *assumpsit* should be alledged, and is not, it is fatal on demurrer, but helped after verdict.

Cafe 88.

Anonymous.

Notice.

WHERE a certain person is mentioned, as if it were, if *J. S.* pay so much money, &c. no notice is necessary; but if it be, as anybody should pay, which is uncertain, there must be notice.

Cafe 89.

Anonymous.

Forcible entry.

IF A JUSTICE OF PEACE record a force on view, you shall not aver against it.

Cafe 90.

Anonymous.

Pleading.

PER SIR SAMUEL ASHTREE. "*Solvit ad diem*" is no general issue; but because it is an ordinary plea, the clerk does not make up a paper-book of it.

Cafe 91.

Lamb *against* Archer.

Term limited to *A.* and the heirs of his body, and if he die without issue, living *B.* then to *B.* it is a good limitation.

S.C. 1. Eq. Abr. 192.

S.C. 1. Salk. 225.

S.C. Comb. 208.

S.C. Carth. 266.

S. C. Holt, 227.

S. C. Skin. 340.

3. Lev. 23.

Palm. 48. 333.

2. Roll. Rep. 129.

Cro. Jac. 459.

SPECIAL VERDICT, that *J. B.* was possessed of a term for years, and had issue two sons, *R.* and *J.* by his wife *E.* and devises to *R.* after the widowhood of his wife *E.* "during the remainder of the term of years which I have to come in tail male;" and for want of such issue as aforesaid, then he gives to *J.* as aforesaid. The contingency has happened.

And THE WHOLE COURT held it a good limitation, for there is no danger of a perpetuity, because the contingency was to happen within a life. The words "heirs males of his body" in the limitation are void, but the subsequent words are good; and the latter words will restrain the former, and make them good: and this differs from *Gibbons v. Somers* (a), for there the dying without issue was indefinite; and *Child v. Baily* (b) has been often shaken, and almost destroyed, by subsequent resolutions (c).

(a) 3. Lev. 22.

(b) 1. Eq. Abr. 192. 2. Roll. Rep. 129. Palm. 48. 333. Cro. Jac. 459. 1. Jones, 15.

(c) See 1. Eq. Abr. 193.

MICHAELMAS TERM,

The Fifth of William and Mary,

IN

The King and Queen's Bench.

Sir John Holt, Knt. Chief Justice.

Sir William Dolben, Knt.

Sir William Gregory, Knt.

Sir Giles Eyre, Knt.

} *Justices.*

Sir George Treby, Knt. Attorney General.

Sir John Somers, Knt. Solicitor General.

* [45]

* Anonymous.

Case 92.

WHEREVER costs are adjudged *de incremento*, it ought to Costs.
be *eidem quer. ex assensu suo*, adjudged. 2. Saund. 107.

Anonymous.

Case 93.

IF ACTION be brought against an administrator by name of executor, he cannot plead in bar *ne unques executor*, and give in evidence he was administrator, because he allows himself to be suable. Vide the next page, Harding v. Salkill.

Anonymous.

Case 94.

IF there be a joint declaration against two, and attorney appears for one of them, and takes a joint declaration, this does not imply an appearance for the other. Appearance.

Anonymous.

Case 95.

NO DECLARATION shall be entered after the second Term, though a *nolle prosequi* be not entered, which may be entered in the Vacation after the second Term, as of the second Term, *quia non comparuit infra Terminum.* Practice.

Midgley

Michaelmas Term, 5. Will. & Mary, In B. R.

Case 96.

Midgleys *against* Lovelace.

Assignee of a reversion may bring covenant for arrears of rent due before he granted the reversion over.

* [46]

S. C. Carth. 189.
S. C. Holt, 74.
Co. Lit. 215.
2. Show. 134.
Cro. Jac. 521.
32. Hen. 8. c. 34.

ASSIGNEE OF A REVERSION, and assignee of a term. The assignee of the reversion granted over his reversion, and afterwards brought covenant against the assignee of the term for rent arrear before the grant of the reversion.

And on demurrer, *TOTA CURIA*, If at common law the assignee of a reversion had granted it over, yet he might afterwards have an action of debt for rent, though he could not distrain or have waste, because his power over the land was determined. It is true, where a man seised of a rent in fee grants it over, there he has no remedy for the arrear, because the distress, which was his only one, is gone by the assignment; but where rent is reserved upon a lease for years it is otherwise, because debt lies on the contract; and here the assignee shall have it as a fruit fallen from the reversion.

Judgment for the plaintiff.

Case 97.

Harding *against* Salkill.

Administrator and not executor pleaded in bar ill.

S. C. 1. Salk. 296.
S. C. Comb. 220.
S. C. Skin. 365.
S. C. Holt, 306.

Ante, 45.
Comb. 220.

Vide postea,
Mich. 7. Will. 3.

Bowers and his
Wife v. Coke.

1. Mod. 239.
3. Mod. 244.

288.
Corny. 150.

4. Lev. 235.
2. Stra. 1106.

3. Pr. Wms. 349.

DEBT against the defendant as executor to one *M.* The defendant pleaded, that *M.* died intestate, and administration was granted to him. The plaintiff demurred.

And it was said to be a good plea; for if he be administrator, he is not chargeable as executor, or *à converso*; and so is *Dyer*, 305. b.

Sed non allocatur, for that case is not law, and rather an evidence to charge the defendant than discharge; this might have been well pleaded in *abatement*, but it is no plea in bar.

And by *HOLT, Chief Justice*, If an action be brought against an administrator by the name of executor, and judgment against him, and afterwards another action is brought by the name of administrator, he may plead the former judgment in bar, *ultra quod, &c.*

And judgment was given for the plaintiff.

Case 98. The Master, Warden, and Company of Cutlers, in Highamshire, *against* Buskin.

A by-law that a cutler shall only take one apprentice at a time is good,

Hard. 56.
2. Barr. 898.

DEBT ON A BY-LAW for forty shillings penalty, that a cutler shall keep no more than one apprentice. Breach assigned, that the defendant *duas personas ut apprentices cepit et custodivit*, and so did not say that they were apprentices.

But *CURIA è contra*; for the design of the Company was in this by-law to hinder any member from qualifying more than one at a time; but if he had taken one to live with him in the exercise of the trade for seven years, this is a sufficient qualification, though the party is never bound as an apprentice; and he shall have equal privileges with one bound.

NORTHEY

Michaelmas Term, 5. Will. & Mary, In B. R. • [42]

NORTHY moved, that the plaintiff might have costs, the action being brought for a sum certain of forty shillings as a penalty. *Where in an action brought for a sum certain, as a penalty, the party shall have costs.*
Vide Cro. Car. 559, 560.

And PER CURIAM, That is a settled case, and costs were awarded; but with this difference put by HOLT, Chief Justice, that where the action is brought by the party grieved and the penalty certain, he shall have costs, because the defendant ought to have paid it without suit; and when a penalty is given to the party grieved, it is certain to whom payment ought to be made; but where brought by a common informer he shall not, for he is altogether uncertain, and has no title to money until he bring his action, and it is that vests an interest in him. *3 C Comb. 224. 5 C Skn. 363. 3. C. Holt, 179. 2. Vent. 133.*

Colethirst against Wiseman.

Case 99.

ERROR OF A JUDGMENT in an action on the case in the inferior court of Hull. *Copies was the first process in inferior court; cured by appearance.*

The error assigned was, that a *capias* was the first process; and the case of *Tuttil v. Milton* (a) was cited.

But PER CURIAM, That case is not law, and so it has been often ruled; for it is but a misconveyance of process, and is helped by appearance. *Vide Sir T. Jones, 165. 1. Inf. 325. a.*

The judgment was affirmed.

(a) Yelv. 158.

Badgerly against Wood.

Case 100.

PROHIBITION to the spiritual court for tithes pigeons; on suggestion that they were spent in the house. *Title of pigeons spent in the house not due.*

HOLT, Chief Justice, doubted.

The King and Queen against Wright.

Case 101.

INDICTMENT for forestalling *centum et octoginta aves* (ANGLICE "turkeys"). *For forestalling "aves," ANGLICE turkeys, good.*

Moved in arrest of judgment, that it was uncertain, and could not be supplied with an ANGLICE. *Stile, 313. Noy, 68. 3. C. Comb. 225.*

But CURIA contra, on the authority of *Hardres*, 361. which was a case in point.

Jones against The Bishop of Llandaff.

Case 102.

PROHIBITION granted to the spiritual court, because the bishop articulated against his chancellor for insufficiency and other the spiritual misdemeanors, and prayed that he might be deprived, which they court on suit there to deprive a chancellor.

(a) Cro. Car. 65. S. C. Godb. 390. S. C. Latch, 228. S. C. Noy, 91. 1. C. Palm. 450. S. C. Lit. Rep. 2. 22.

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Cafe 103.

* The King against Hebbard.

Trespass, assault, and battery; if the defendant in his plea vary from the time alledged, he must aver *quæ est eadem transgressio*; but where he agrees in the time, he need not.

the time, he must aver *quæ est eadem transgressio*.—S. C. Holt, 548.

Cafe 104.

Anonymous.

Debt on a judgment; plea writ of error depending in the exchequer-chamber, ill.

DEBT ON JUDGMENT in this court. He pleads in abatement *quod adhuc respondere non debet*, because of a writ of error depending in the exchequer-chamber. The plaintiff demurred.

And IT WAS ARGUED for the plaintiff, that an action lay; for if it would not lie before affirmance, it would be to no purpose that action of debt might be brought on a judgment; for after affirmance the plaintiff may sue execution; and no man that can sue execution will be at the trouble of bringing an action of debt. 1. Sid. 236. is a case in point; and the difference there between a writ of error of a judgment in the king's bench and such a writ of error as this had no foundation in law.

Quod HOLT, Chief Justice, concessit; for debt will lie in the common pleas upon a judgment there, after error in the king's bench, as well as on a judgment here, after writ of error in the exchequer-chamber.

Ante, 43.

HOLT, Chief Justice. It is strange, that a writ of error should supersede an execution by one mean, and yet allow a man to come at it by another: there was no remedy at common law for debt or damages, when a year had passed after judgment, but by action of debt, until the statute of Westminster the Second gave a *scire facias* after the year; and it is resolved, Yelv. 29. that an executor could not plead a judgment against his testator after error brought in bar of a *scire facias* upon a statute, because it was doubtful whether it should be affirmed or not: but I will be bound by constant resolutions of this Court, which are, that this is no plea in bar or in abatement. It is true, there have been some resolutions to the contrary in the exchequer-chamber, and judgments have been reversed there in my LORD NORTH's time for this error; and in CHIEF BARON TURNER's time, and particularly in the case of *Danvers vs Smith*; but that was a new notion.

DOLBEN and EYRE, Justices, acc. (absente GREGORY).

EYRE, Justice, cited Mod. 121.

And THEY ALL AGREED, there was no difference between its being pleaded in abatement and in bar; and so is the eighth of William the Third, PER TOTAM CURIAM.

HILARY

HILARY TERM,

The Fifth of William and Mary,

IN

The King and Queen's Bench.

Sir John Holt, *Knt. Chief Justice.*

Sir William Dolben, *Knt.*

Sir William Gregory, *Knt.*

Sir Giles Eyre, *Knt.*

} *Justices.*

Edward Ward, *Esq. Attorney General.*

Sir Thomas Trevor, *Knt. Solicitor General.*

* [49]

* *Benson against Scott.*

Case 105.

EJECTMENT. Special verdict, that *Scot* was seised of a copyhold lands in fee, according to the custom of the manor, and surrendered to the use of *M. Collard*, upon condition, that on payment, &c. the surrender should be void; the condition is presented broken; *Scott* dies; *M. Collard* is admitted, who surrenders to the lessor of the plaintiff, who was heir to *Scott*. They find the custom within this manor, that the wife of the copyholder shall have her *frank-bank* of the copyhold lands of which her husband died seised; and that after the death of *Scott*, the defendant, being relict, entered, and was admitted according to the custom, and continues yet a widow.

A copyhold estate surrendered on a condition to be void on payment of a sum of money, will, on non-performance of the condition, defeat the wife of the surrenderer of her *frank-bank*.

And *PER TOTAM CURIAM*, The admittance of *M. Collard* shall avoid the *frank-bank*, to which otherwise the wife is intitled; for though the lessor of the plaintiff be found to be heir, yet that does not alter the case, for he comes in as purchaser, and is in of her estate; and the *frank-bank* is not inchoate by marriage, like dower, for if it were a lease or alienation in the husband's life would not bind it as it does, but it depends purely on the dying seised; but this was defeasible by admittance of the surrenderee; and when that comes, the *frank-bank* must fall with the estate out of which it is extracted (*u*).

S.C. 4. Mod. 251.
S.C. 3. Lev. 285.
S.C. Salk. 185.
S.C. Comb. 233.
S.C. Skin. 406.
S.C. Carth. 275.
S.C. Holt, 160.
1. Roll. Abr. 508.
Poph. 105.
Gilb. Ten. 322.

(a) See *Fareley's Case*, Cro. Jac. 36. *mous*, 1. Freem. 516. *Salisbury v. Parker v. Blecke*, Cro. Car. 568. Hall Hurd, Cowp. 421.
v. Arrowsmith, Poph. 105. *Anonymous*.

Hilary Term, 5. Will. & Mary, In B. R.

Cafe 106.

Anonymous.

Whole hundred
is the *visité*.

HOLT, *Chief Justice*. The whole hundred where the place is,
is the *vicinitus* thereof.

* [50]

Cafe 107.

* Anonymous.

Vide 1. Cro.
340. 448, 449.
4. Inst. 164.

AT THE QUARTER-SESSIONS, there may be a trial the same
sessions, if there be an adjournment, so as there may be fifteen
days between the *teste* and return.

Cafe 108.

Batson *against* Goodwin.

Plea that the in-
dorsee was a
bankrupt at the
time of the in-
dorment, but
must plead that
a commission
was taken out.

ACTION ON THE CASE by an *indorsee* against the *first drawer*
of a bill of exchange. The defendant pleaded, that the *indorser*,
at the time of indorsement, was a bankrupt. Demurrer.

PER CURIAM. This is a good plea in bar, for a bankrupt is
disabled to assign a bill : but then he ought to have pleaded a com-
mission taken out : wherefore

Judgment was given for the plaintiff.

Cafe 109.

Hibbord, *against* Coulthrop.

An *assumpsit* for
work and labour
generally is
good.

IN ASSUMPSIT, the error assigned was, that it was for *work and*
labour, without shewing what.

Sed non allocatur ; for it is enough to shew, that it was upon a
simple contract upon which this *assumpsit* can arise ; and the Court
will not intend it to be an illegal consideration (a).

S. C. Carth. 276.
S. C. Skin. 409.
Hob. 18. 216.

1. Brownl. 14. 1. Bulst. 153. Cro. Jac. 397. 548. 593.

(a) Gardiner v. Bellingham, Hob. 5. Pinfack, 2. Lev. 153. Russell v. Collins,
Woodward v. Deacon, Cro. Jac. 206. 1. Mod. 8. S. C. 1. Sid. 425. S. C.
Rooke v. Rooke, Cro. Jac. 245. More 1. Vent. 44. S. C. 2. Keb. 552. Dixon
v. Conham, Owen, 123. Fowke v. v. Willoughs, 1. Salk. 446.

E A S T E R

E A S T E R T E R M,

The Sixth of William and Mary,

¶ N

The King and Queen's Bench.

Sir John Holt, *Knt. Chief Justice.*

Sir William Gregory, *Knt.*

Sir Giles Eyre, *Knt.*

Sir Samuel Eyre, *Knt.*

} *Justices.*

Sir Edward Ward, *Knt. Attorney General.*

Sir Thomas Trevor, *Knt. Solicitor General.*

• [51]

* The King *against* Tucker.

Cafe 110.

ERROR to reverse an attainder of high treason, in which there were two exceptions taken:

FIRST, The omission of amputation of secrets.

SECONDLY, Of *contra ligeantiae suae debitum*, in the conclusion of the indictment.

HOLT, *Chief Justice*, and EYRE, *Justice*, held, that the cutting out of the members was not a fatal fault; for though it be part of the judgment, yet it is not found in a precedent before the twelfth year of *Charles the Second*; and therefore if we should reverse it on this account, it would let in a great confusion on men's inheritances who purchased under attainders.

But SAMUEL EYRE, *Justice*, in this, would give no opinion.

SED PER TOTAM CURIAM, The other, of *ligeantiae suae debitum*, is fatal; though a few records were shewn where they were omitted, as the record mentioned in *Bensted's Case (a)*, *Sir Harry Vane v. Lambert*, in the fourteenth year of *Charles the Second*; *Cotton v. Messenger*, in the twentieth year of *Charles the Second*.

Indictment for treason, not saying *contra ligeantiae suae debitum*.

S. C. 3. Lev. 376.
S. C. 4. Mod. 162.
S. C. 2. Salk. 630.
S. C. Comb. 257.
S. C. Skin. 338.
360. 425. 443.
S. C. Carth. 317.
S. C. Show. P. C. 186.
S. C. Holt, 678.

(a) 1. Cro. 583.

Easter Term, 6. Will. & Mary, In B. R.

THE KING
against
TUCKER.

SAMUEL EYRE, *Justice*. These words are necessary in the conclusion of the indictment, because he who owes no allegiance is not indictable; as an alien enemy, 7. Co. 6. b. 3. *Inst.* 11. 1. *Inst.* 129. *Dyer*, 144. *Hob.* 271.

* [52]

GILES EYRE *accord*. Every indictment ought to contain sufficient form and matter, and an apt conclusion; and as to the two first of these, and that the fullness and certainty cannot be supplied by argument or implication, he cited 2. Cro. 20. 3. Cro. 93. 5. Co. 121. And to the apt conclusions, and that without them they are erroneous, he cited 2. Cro. 527. 2. Roll. Abr. 82. where *contra pacem* is held a necessary conclusion on indictment, and *contra formam stat.* has been held necessary upon * indictment on a statute, and want of them error. 2. Cro. 142. And no words will supply this.

HOLT, *Chief Justice, acc.* An alien enemy cannot commit treason, and therefore these words are necessary, and cannot be supplied by any other words, no not by *debitum ligeantie minimè ponderans*, because he may not well consider allegiance, and yet not act against it; nor by the words *contra dominum regem verum et indubitatum dominum suum*, because these are not words of necessity, but put in lately; for in former times were only *contra dominum regem*, 1. Cro. 120. 122. And words unnecessary shall never supply words necessary and requisite; but I do not think these words necessary in the conclusion, but ought to be averred somewhere. I have seen several precedents which have them in the beginning. *Contra naturalem dominum* will not supply it; and the omission of *contra pacem* is error, though breach of peace appears plainly in the indictment.

SAMUEL EYRE, *Justice*, delivered *Justice* GREGORY's opinion to be the same.

Case 111.

Goodright against Cornish.

Devise for fifty years to A. if A. should so long live, and after to the heirs male of A.; and for default of such issue to B. in tail; the remainder to the heirs of the body of A. is void, there being no freehold to support it, and the remainder to B. takes effect presently. — S. C. 4. Mod. 255. S. C. Salk. 226. S. C. Holt, 227. S. C. Comb. 254. S. C. Skin. 408. S. C. 1. Ld. Ray. 3. Vide postea, Pasch. 11. Will. 3. Scattergood v. Edges, ante, 39.

EJECTMENT. Special verdict, that in the year 1663 one *Knowling*, seised of lands in fee, had issue three sons, *J. R.* and *R.* and on the twenty-seventh of *March* made his will. and devised his lands to his son *J.* for fifty years, if the said *J.* should so long live; and after the determination of the said term, then to the heirs males of the said *J.*; and for default of such issue to *R.* in tail; the remainder to *Robert* the third son in tail male; remainder to the right heirs of the devisor. They find, that the devisor died seised, that *J.* the son entered, and in the third of the king and queen he suffered a common recovery, as tenant to the *præcipe*, brought by one *J. R.*; that the recovery was to the use of himself for life, and after his death to his first and every other issue; and for default of issue of his body, to the defendant in fee. They find,

that

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that *J.* the son died seised without issue; the defendant entered; and that *K.* the second son died, leaving *J. K.* the lessor of the plaintiff.

GOODRIGHT
against
COMMON.

And PER CURIAM, *J.* had no estate-tail, and the recovery did not bind *R.* who had good title.

HOLT, Chief Justice, relied on 2. Leon. 70. and said, that if the words, "if the eldest son die without issue," in that case, would not make an estate-tail by implication in the eldest son, *à fortiori* the words * in this case shall not, there being a term for years expressly given, which shall not be drowned by implication of law. And he likewise said, that remainder limited by the devise to the heirs of the body of *J.* was void, having no freehold to support it; and that *per verba de presenti* one could not devise an estate to the heir of one living, but *per verba de futuro* one may, viz. to the heirs of *J. S.* after the death of *J. S.*; and this shall enure as an executory devise: and so WINDHAM held in the case of *Snow v. Cutler*, where he held a devise to an infant *in ventre sa mere* good *per verba de futuro*, viz. take after he was born, otherwise *per verba de presenti*; and the remainder limited to the heirs of the body of *J.* being void, the next remainder limited to *K.* must take effect presently. That this was not an executory devise to the heir of the body of *J.* it being limited expressly as a remainder. But admitting it were so, yet it could vest no estate in *J.*; and he dying without issue, the estate devised to the heir of his body, though it did take effect as an executory devise, must be void.

* [53]

Reeve against Long.

Case 112.

ERROR in the court of common pleas in ejectment. Special verdict: *J. Long* seised in fee had three brothers, *A. B.* and *C.* and devises these lands to *A.* for life, remainder to the first son of *A.* in tail male, and so to the second and third sons; and for default of such issue to *B.* for life, and to his first, second son, &c. in like manner: the devisor dies, *A.* being unmarried; *A.* marries and dies without issue born, but the wife was *privement enscient* with a son, who is born after. The judgment in the common pleas was, that the posthumous son had no title; and it was affirmed here: and they held, that a remainder to the first son of *A.* was a contingent remainder, and so must take effect, according to the rule in *Archer's Case*; but at the time of the death of *A.* there was a default of issue male, on which the estate vested in the possession of *B.* and shall not be removed against the birth of a son after. And this is no executory devise upon the rule laid down in 2. Saund. 388. Where a contingent estate is limited to depend on a freehold capable to support the remainder, it shall never be construed an executory devise. This judgment was reversed in the House of Lords (*a*).

S. C. 4. Mod.
282.
S. C. 3. Lev.
408.
S. C. Salk. 217.
S. C. Skin. 430.
S. C. Comb. 252.
S. C. Carth. 309.
S. C. Holt, 228.
S. C. 2. Eq. Abr.
336.
4. Mod. 259a
cited.

vide 10. & 11.
Will. 3. c. 16.
provision for
posthumous
children.

(a See S. C. 4. Mod. 282

E 4

Anonymous.

• [54]

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Case 113.

• Anonymous.

IF A WRIT be returnable here, though it issue out of chancery, this Court may compel the sheriff to return the writ,

Case 114.

Anonymous.

IF A WHOLE TERM intervenes, there may be execution against the bail, notwithstanding a writ of error in parliament.

TRINITY

TRINITY TERM,

The Sixth of William and Mary,

IN

The King and Queen's Bench,

Sir John Holt, Knt. Chief Justice.

Sir William Gregory, Knt.

Sir Giles Eyre, Knt.

Sir Samuel Eyre, Knt.

} *Justices.*

Sir Edward Ward, Knt. Attorney General.

Sir Thomas Trevor, Knt. Solicitor General.

Combes *against* The Hundred of Bradley.

Case 115.

ACTION upon the statute of HUE AND CRY, by a servant who was robbed of his master's money.

A servant robbed of his master's money may sue on the statute of Hue and Cry, and cannot release.

LEVINS argued that he should not; for by that means he might prejudice his master, by releasing the action; and took a difference between a servant, and a common carrier, and a sheriff; for the two last have a special property, and may have trover.

S.C.Comb. 263.
S. C. Holt, 37.
S. C. 4. Mod.
303.

But PER CURIAM, He shall not release; and 1. *Brownl.* 155. is a full authority.

S. C. 2. Salk. 613. Stiles, 156. 2. Leon. 82. 3. Mod. 288. 4. Com. Dig. "Hundred" (C. 3). 5. Com. Dig. "Pleader" (2. S. 8.). 3. Bac. Abr. 69. 4. Bac. Abr. 279.

The Count of Arran *against* Crisp.

Case 116.

THE PLAINTIFF made a lease to the defendant in 1675, reserving such a rent, and the defendant covenanted to pay the said rent "clear of all taxes and assessments whatsoever imposed or to be imposed," and gave bond for performance of covenants; and in debt on this bond, after *oyer*, the defendant pleaded "conditions performed." The plaintiff replied the lease and covenants, and assigns for breach the defendant's not paying two years rent at

Covenant to pay taxes generally includes parliamentary taxes.

* [55]

S. C. Salk. 221.
S. C. Holt, 549.

Lady-

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COUNT OF
ARRAN
against
CRISP.

Lady-Day last. The defendant rejoined, and says, he paid so much in money, and so much in taxes payable by the act of four shillings aid *per* pound, amounting in all to the rent due. The plaintiff demurs.

The question was, Whether this covenant extends to charge the defendant with *parliamentary taxes*, because the word "parliament" is not expressed in the covenant?

And THE WHOLE COURT, except HOLT, *Chief Justice*, was clearly of opinion it did.

Departure.

2. Inst. 304. a.
1. Lev. 81.

But *per* HOLT, *Chief Justice*, Judgment ought to be for the plaintiff for a fault in pleading, though the law, as to the matter, be for the defendant; for the matter of this rejoinder, being by way of excuse, ought to be set forth in the bar; and as it is here set forth in the rejoinder, it is a departure; for where before he says he performed the condition, now he says he is not obliged to it.

Judgment for the plaintiff.

Cafe 117.

The King and Queen against Knowles.

On an indictment for murder by the name of *Charles Knowles*, he pleaded in abatement misnomer, that he was *Earl of Banbury*, and held a good plea.

S. C. 1. Salk.

47.

S. C. 2. Salk.

509.

S. C. 3. Salk.

242.

S. C. Comb. 273.

S. C. Carth. 297.

S. C. Skin. 336.

517.

S. C. Trem. 11.

S. C. 1. Ld Ray.

10.

S. C. 8. St. Tr.

50. 58.

CHARLES KNOWLES was indicted for a murder, and the indictment was removed into the king's bench by *certiorari*, and the defendant brought to the bar by *habeas corpus*; and he pleaded in abatement to the indictment, that *King Charles*, in the second year of his reign, did, by letters patent, produced now in court, create *William*, then *Viscount Wallingford*, *Earl of Banbury*, and granted the honour to him and the heirs males of his body: that *William Earl of Banbury* died seised of this honour; and that it descended to *Edward Knowles*, son and heir of the said *William*: that *Edward* dying without issue, it descended to *Nicholas Knowles*, his brother and heir, and son and heir-male of the body of *William*: and that *Nicholas* died, leaving issue an heir of his body, *Charles* the defendant; by virtue of which patents and descents he became *Earl of Banbury*; and because he is not named *Earl of Banbury* in the indictment, he prays judgment if he shall be put to answer.

THE ATTORNEY-GENERAL, protesting that no part of the said plea is true, replies, that on the thirteenth of *December*, in the fourth year of *William and Mary*, the defendant preferred a petition to the lords spiritual and temporal in parliament assembled, in which, alledging that he was a peer of this realm, he desired that he might be tried by his peers; and upon this *taliter processum fuit secundum legem et consuetudinem parliamenti*; yet it was resolved, * considered, and ordered, by the lords, &c. that he had no hereditary right to the earldom of *Banbury*; and that his petition should be dismissed. To this replication the defendant demurred.

SAMUEL EYRE, *Justice*. This order of the house of lords does not bar the defendant of his peerage, nor conclude the Court from examining the force and effect of the order.

FIRST,

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FIRST, All misnomers here pleaded are within the jurisdiction of this Court; and in such a plea, the Court may judge whether the party that so pleads be a peer, or hath a title to peerage, or no.

The court of king's bench to judge of the validity of all records and judgments pleaded there.

SECONDLY, That this Court shall judge of the validity of all judgments and records here pleaded, and whether they are legal and effectual or no; as of an act of parliament, what is one; that an act by king and lords is not a good one; and so they may judge of an order of the house of lords, whether the concurrence of the other estates of parliament, or one of them, be requisite: so the Court may take judicial knowledge of the proceedings in parliament, and of their committees (a).

As to the objection, that the defendant hath, by his demurring, confessed this to be a judgment *secundum legem et consuetudinem parliamenti*; this is matter of law arising thereon; and demurrer confesses only matter of fact, as stated, and leaves the matter of law arising thereon to the judgment of the Court (b).

As to the order of the house of lords; all the books are, that a peer cannot be degraded but by attainder, or by act of parliament (c); nor can he by fine divest himself of his honour, as adjudged in *Lord Purbeck's Case* (d), because the king and kingdom are interested in his honour, and therefore it cannot be taken away without their consent. Where there has been a contest to whom an honour descended, upon petition to the king it has been referred to the lords, and by them examined, and their opinions reported to the king, as in my *Lord of Oxford's Case* (e). So in the case of a contest about precedency (f). And it is a great reason that the king, who creates all peers, should be party to their deprivation.

A peer cannot be degraded but by attainder or act of parliament.

To the plea; it is sufficient, without averring *Banbury* to be in *England*; for the creation being by letters patent under the great seal of *England*, he shall be intended an *English* peer; for it is the letters patent, and not the title, that makes an *English* peer; and therefore the title may be taken from a foreign place, as *Earl of Angus*, *Duke of Albemarle*.

And as to the objection to the conclusion of the * plea, where it is said, "*et hoc paratus est verificare*," without saying, "*per recordum*," and without a writ to certify his peerage, that is well enough. Trial by writ must be appropriated to peers created by writ; but peerage by patents appears by the patents themselves. Where my *Lord Coke*, in his *Sixth Book*, says, that baron or not baron is tried *per recordum*, he says, baroness by marriage, being matter of fact, is triable by jury; and so are the descents in this case: the patents produced are good evidence of the first creation; but the plea, consisting of matters of fact, had been ill if it had concluded

* [57]

9. Co. 31.
Post. 61.

(a) *Lake v. King*, 1. Saund. 133.

(b) *Plowd.* 85.

(c) 4. Inst. 355. *Cotton's Records*, 762. 22. Co. 107.

(d)

(e) *Jones*, 97.

(f) 22. Co. 1.

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THE KING AND QUEEN *against* KNOWLES. to the record ; but as it is the defendant's plea is good and the replication ill ; and therefore the indictment ought to be quashed.

GILES EYRE, *Justice, acc.* to the last point *in terminis* ; for the patents produced have verified the first creation of his peerage, for the patents are a complete creation without more. 12. Co. 107. 1. Inst. 16. *Noy*, 150. When a patent is pleaded and produced in court, *nul tiel record* cannot be pleaded to it ; the descents pleaded are matters of fact, and nobility gained by matter of fact is triable by the country ; and the case is the same if gained by descent ; there is no necessity of having a writ out of chancery to certify whether one be a peer by descent ; and none of the cases at the bar, for that, is applicable to this, for they are all writs of privilege and exemption. As to the second objection, that *Banbury* is not an *English* town, he held as before, and said, that an *Irish* peer may be created under the great seal of *England*, but then there must be special and exprels words, *viz.* an earl *in regno Hiberniæ*, *Seld. Tit. Hon.* 696. The reason of a certain place from whence to take the title was to make an estate-tail within the statute *de Donis*, which extends only to limitations which concern lands and tenements ; and therefore without naming some place a limitation of an honour to one and the heirs males of his body would be a fee-simple conditional at common law, and if so would be forfeited by attainder of felony, as an estate-tail of a baronetship, which is not created of any place. 12. Co. 81. 3. The defendant need not aver that he is *unus parium Angliæ*, for the pleading of the patents and descents shew that sufficiently ; but a bishop, who is a peer

Descents are matter of fact.

A bishop having no patent to produce must plead he is *unus parium Angliæ* ; not so of a lord.

* [58]

Peerage cannot be revoked.

1. Inst. 16. b.

1. Inst. 9. b.

A writ gives a fee in the honour, but in letters patent it must be limited by apt words.

An earl is a public officer.

away but by * attainder or act of parliament, or by *seire facias* (where created by letters patent) to repeal those patents ; for the king cannot revoke them, because it is a common-law conveyance, and thereby an interest is vested and settled in the patentee. A writ indeed may be superseded before an actual sitting of parliament, but otherwise of an honour created by patents. A writ gives a fee in the honour without exprels words ; but in case of letters patent, the estate in the honour must be limited by apt words, or else it is void ; it may be intailed, and must descend according to the intent of the common law, and was forfeited for treason before the statute of 26. Hen. 8. 7. Co. 34. As to the order ; every vote of the lords is not a judgment ; the defendant's petition cannot give the lords a jurisdiction, if they had none before, but upon petition to the king, and reference to the lords ; and this has been the course used in my *Lord Delaware's*, *Oxford's*, *Abergavenny's*, *Purbeck's*, and *Fitzwater's Cases* ; and this course is most reasonable, that the king being the fountain of honour, as nobility cannot be created without him, so it shall not be determined without his consent in a parliament. An earl is a public officer in time of war and peace, and the king and subjects have an interest in him. 7. Co. 34. 12. Co.

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12. Co. 28. 4. Inst. 126. The king, by his prerogative, having election of any of his courts to try his cause, he may, by indorsement of such petition, refer the trial of it to any court, and thereby gives the Court a jurisdiction of it. There is no precedent where the lords exercised a jurisdiction to determine the right of peerage without such reference. The lords have a jurisdiction over their members as to their sitting in parliament and precedency there, but not over their members estates and inheritances in their honours; but they are to be determined by common law. Their order does not bind the liberty of the subject; as 2. Inst. 47. about sending able lawyers into *Ireland*. Inferior courts are not tied up from judging their proceeding void; as if a writ of error be brought in parliament of a judgment in the common pleas, whereas it should have been in the king's bench, the common pleas may adjudge the writ of error void, and no *superfedeas*, and may award execution; or the king's bench, notwithstanding this error, may examine the judgment upon writ of error. As to the demurrer; that confesses only matter of fact, and not of law; *et lex parliamenti* is matter of law. As to the precedents; they are petitions, sitting the parliament, for trial. A peer cannot waive his * trial by peerage; 3. Inst. 30. but the king is not bound by their order for a trial, for he may choose whether he will appoint a high steward. In the *Lord Preston's Case*, there was no creation of honour at all; it was not under the great seal of *England*, and the setting it up was a crime next to treason. *Piercy's Case* concerned precedency for a place to sit in the house; and after several trials and translations below, and depositions and Counsel heard there, he was declared an imposter; and so concluded for the defendant.

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The lords have power as to precedency there, but not over the estates of the members.

Show. Parl. Caf. 1.
Contra resolved in the lords.

Keyl. 56.

* [59]

GREGORY, *Justice, accord. in omnibus.*

HOLT, *Chief Justice.* The plea is good, and the replication bad. By the plea, the defendant has made a good title to the dignity in the ancestor by letters patent, and by descent to himself. FIRST, As to the exception that it does not appear that *Banbury* is an *English* town, he said, an earl created by letters patent under the great seal of *England* shall be intended an *English* peer, if not otherwise expressed; and to make this the clearer, he examined the original and antiquity of earls. An earldom formerly consisted of three things, dignity, office, and revenue. As to the dignity: Before *Edward the Third's* time there were only earls and barons; barons were first created by tenure, and afterwards by writ, and since 11. *Rich. 2.* by letters patent; earls were always created by patents. *Seld. Tit. Hon.* 536. 538, 539. Secondly, Their office is of trust, for the safety and defence of the realm; they are not called *comites* from the county, but *à societate regia*; they assisted the king in war and peace; and therefore an earldom in tail before 26. *Hen. 8.* was forfeited for treason, by a tacit condition annexed in law, because of the breach of trust and confidence in the party that was made noble, and so *contra officii sui debitum*. 7. Co. 34.

Postea, Mich.
7. Will. 3. Lord
and Lady Ger-
rard.
9. Co. 49. a.

Thirdly,

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Thirdly, Their revenues were castles, or other profits annexed to their honours, and suitable for the support of their dignity ; which was the reason that by *Magna Charta* an earl's heir was to pay a relief of an hundred pounds, whatever was his portion ; and the relief of an earl and a baron were settled at different rates : but in process of time, these revenues annexed to the honour diminished ; but while the revenue was annexed *sub nomine et honore*, the relief continued the same ; and therefore the words are not *sub nomine et honore*, but *ad sustinendum nomen et onus*. 2. *Inst.* 9. 1. *Inst.* 88. b. So the revenue not being annexed, as formerly, earls have not paid relief *pro integro comitatu*, but as other persons, according to their possessions ; but the place from whence an earl is named is but a titular distinction, and no part of the dignity. The earldom is not confined to the place, but extends through the whole kingdom. SECONDLY, The great seal is proper and peculiar to *England*, and to no other place ; for by that seal the king acts as *King of England* only, without respect to any other dominion. If before the conquest of *Ireland* one was created by *English* letters patent, and the title was the name of a place in *Ireland*, he would certainly have been an *English*, not an *Irish* peer ; and so it is now ; for the conquest of *Ireland* being an external accident, cannot alter the construction of patents and laws of *England*. The intendment, that *Banbury* is out of the realm, is a foreign construction : though the king by *English* patent may create an earl of *Ireland*, yet that must be by express words, because it is a special act of prerogative ; for the great seal extends into *Ireland*, because subordinate, and subject by conquest ; and the king's patents may be construed as acts of parliament, which extend not to *Ireland* if it be not specially named. *Seld. Tit. Hon.* 696. In the creation of nobles, it is not mentioned in what county the place is from whence they take their titles ; which would be, if necessary that the place should be in *England*. Many *English* earls have titles from foreign parts. *Sir Richard Woodville* was created *Earl of Rivers* : There was an antient family called *Rivers*, that were *Earls of Devon* in *King Edward the Third's* time, but there is no place to be found of that name. Since 21. *Hen.* 8. patents of earls have had these additional words in them, that the patentee shall have *sedem et vocem in parliament. inter comites Angl.* but the *Earl of Rivers's* patent has no such words, or any other than are here pleaded by the defendant.

An earl need not aver that he is *unus parium Anglie*.

Baron created by patent is part of the name ; not if by writ.

3. *Inst.* 26.

As to the defendant's not averring that he was *unus parium*, &c. an earl in pleading need not make that averment ; and 6. *Co.* 53. and 8. *Hen.* 6. 9. in which that is made, is in case of baron only. Baron indeed is an addition ; if created by writ, it is no part of the name ; if created by patent, it is. But a baron must not plead or be called only *dominus*, but must say *parliamenti* ; for one may be called *dominus*, as an earl's son, and not be a lord of parliament. Besides, the defendant here does not claim a privilege as a peer, but pleads a misnomer in the omission of his title, which being given him by letters patent is part of his name. Being a peer or lord of parliament does not exempt him from being indicted here, and therefore

fore not material in this case. He that claims benefit of trial by peers must shew himself to be *unus parium*, &c. ; but * this plea is no more than if a knight had pleaded misnomer in not being named a knight. As to producing a writ to certify the peerage, it is to be answered, that there be some barons, and one earl, so antient, that their commencement cannot be shewn ; such can no way intitule themselves but by prescription ; and such ought to produce a writ that some of their ancestors sat in parliament, and then derive a title by descent from such ancestor to him that pleads it. In the 7. Co. 15. *Calvin's Case*, if compared with other books, is no more than that it shall be testified by record of parliament if the party or his ancestors sat as peers in parliament ; which proves, that if any ancestor appears on record to have been a peer, as here it doth by letters patent, it is sufficient, and that title may be derived by matter of fact, as by descent. The writ intended is in nature of a writ of privilege ; if founded on record, it testifies matter of record, and is conclusive ; but if it certifies matter of fact, as it must do in such a case as this, it is traversable, notwithstanding such certificate, and therefore signifies nothing ; and therefore if the plea should conclude, *et hoc paratus est verificare per recordum*, it would be ill, for the only matter traversable is matter of fact. A writ to certify their descents would be vain ; for where a writ certifies a thing which lies as much in the conscience of the court to whom it is certified as of the court which certified it, it is needless. Upon pleading creation of peerage by writ, such writs are brought for expedition, not necessity, but to prevent the delay which would be on a traverse and taking issue on the sitting of the parliament, which traverse cannot be after such certificate. So if the defendant, in his plea, shew the letters patent that created the honour, they cannot be traversed, or issue taken on earl or not earl, except the patent be denied, which cannot be, because it is produced ; and these patents are not like those of lands, where *non concessit* may be maintained by matter foreign ; as that the lands do not appear under the description in the letters patent ; or that there are divers lands or tenements of the same name. As to the replication, that does not conclude the defendant : First, Because the order is no judgment of parliament ; secondly, the plea pending does not concern the title of his earldom ; thirdly, there is nothing in this order to bar him from enjoying the right and title of earl. First, It is no judgment of parliament. That court consists of king, lords, and commons. *Crompt. Jurisd. of Courts*, 1. 4. *Inst.* 1. *Dyer*, 60. The authority of the house of lords is legislative and judicial. The judicial power is actually executed and administered by the lords, but is legally and virtually in the king ; if not, in the whole parliament. All judicial proceedings are either *coram rege in parlamento*, or *placita de parlamento*, or *coram rege et ejus concilio in parlamento*. *Ryly's Pl. Parl.* f. 1. 114. 145. 157. 63. 66. 267. 292. Writs of error are *coram nobis ad præsens parlamentum* : the judgment *per cur. parliamenti*, and not *per dominos spirituales et temporales* ; and though the journals are by the lords spiritual and

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3. *Inst.* 30.

9. Co. 31. a.
49. 2.

Ante, 57.

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and temporal, yet they are only as notes and warrants for the clerk to make up the rolls by. *Hob. 110.* All courts mention the king; either to give them jurisdiction, or as party to the judgment; for all derive their jurisdiction from him. The lords then having double capacity to act judicially, as the court of parliament, or to act as a particular house, we cannot know in which capacity they act but by the stile of their orders; and if they act by the stile of the lords spiritual and temporal, they act as a distinct house, exclusive of the other estates. In the court of king's bench, which is holden *coram rege*, the judgment is not entered to be given *per justiciarios*, though they actually give it, but it is said *per cur. domini regis*; and a judgment given in another form or stile would be void; and though the Judges give it, yet it would not be a judgment of the Court. This is an original cause, and therefore ought not to come at the first step to the last resort: and the reason is, because generally original causes are mixed with fact as well as law, which is below their dignity to determine, because it concerns only individual cases, and are not general points of law, which reach to all causes within the like reason. If error in fact happen here, a writ of error lies not thereof in parliament, but here before ourselves; and this is out of necessity, because the parliament cannot try the fact: but out of other courts, inferior to the king's bench, error doth lie into the king's bench upon errors in fact. If the house of lords had original consuance, the party would lose the benefit of an appeal; and to have a man's right finally determined by the first judgment is not consonant to law: and therefore a writ of error brought into the house of lords of a judgment in the common pleas or exchequer, *per saltum* is void. 4. *Inst. 21.* So was the *Earl of Macclesfield's Case*. The * proper remedy for a title of peerage is by common law, by petition of right to the king, which he indorses *soit droit fait*, &c. and delivers it to the Chancellor, where there is occasion; and in such petition the party ought to set forth his right and title, as the defendant doth here in his plea; and when indorsed and sent into chancery, a commission issues out to enquire the truth of his suggestion; and if the inquisition find it true, then the attorney-general may confess it or traverse it; and if upon the traverse an issue is joined, the record must be sent into the king's bench, and there tried, and judgment given. *Stamf. Prærog. 72, 73.* And these proceedings are such as are in other cases, where the subject is aggrieved by the king or those employed under him, whether it concern lands, personal things, &c. As to the precedents cited; my *Lord Delaware's Case* was referred to the lords, not by way of judicature, but for their opinions and advice; and if the lords had then conceived they had a judicial jurisdiction, it is to be presumed they would not have waived it, and submitted to have taken it upon them by way of reference; and the queen did not in that case proceed judicially, by indorsement of the petition to the chancery; but the case concerning the lords, she took their advice, and comprised it in an extrajudicial and amicable way: and so was the *Earl of Oxford's Case* by consent, and not by judgment of

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of the house of lords ; and *Lord Abergavenny's Case* is recited to be by way of reference : the *Lord Mountjoy's Case* was concerning precedency, and so within their consuance as a breach of privilege, and was a point necessary to be settled before he was introduced ; but the inheritance of the dignity and title is not in question : the *Lord Preston's Case* was, that he gave out in speeches that he was an *English* peer, which assumption was a breach of privilege ; and when he was demanded to shew the truth of his pretence, he produced a patent, which appeared void, as if it had been under the *French* king's seal ; and it was directed that he should be prosecuted as a criminal. Secondly, There is no plea pending concerning the right of the earldom ; the defendant's petition does not pray to be admitted to the earldom, but supposes him in possession of it, and also desires to be tried by his peers. The lords on this could not adjudge that he should enjoy the earldom, because he does not demand or pray that ; no more can they that he should lose it. Every judgment must be *pro* or *con.* answerable to * the demand of the plaintiff, and adequate and proportionable to it. Thirdly, This order appears to be no judgment, but an opinion : it is no exclusion from the enjoyment of the office or honour, which ought to be in every judgment ; and it is not sufficient that it declares the right : as in a *quo warranto*, *videtur Cur.* that the defendant hath no title to the franchise, is not a judgment, but a foundation of the judgment only ; but the judgment ought to be *quod amoveatur*, &c. for every judgment ought to be such as it may be executed. So in *Lewett and Hall's Case*, 2. Cro. 284. judgment against the plaintiff, without *nil capiat per billam*, is not good. The judgment here is such as cannot be executed. The dismissal of a petition is the form of a judgment in a court of equity, but not in a court of law. In a judgment, it is not sufficient that the party has no title, but it must be expressly adjudged that he hath none. As to the *secundum legem consuetud. parliamenti*, that is added by the king's council only in *terrorem*. *Lex parliamenti* is *lex terræ* ; and if a question concerning it doth arise in a cause of which the king's bench has proper consuance, the king's bench may adjudge of it as the spiritual courts do of temporal judgments, as patents, deeds, &c. for the consuance of the principal draws to it the consuance of the accessories and incidents. *Dyer*, 60. And this holds in case of privilege of parliament ; as in *Sir John Benyon's Case*, Trin. 14. Car. 2. in the common pleas, where filing an original against a sitting member was adjudged no breach of privilege. So a writ of error in parliament, if a Term intervene after the *teste* and before the return, hath been adjudged to be no *superfedeas* of execution. So on a *habeas corpus*, the king's bench hath determined what continuance a commitment by parliament shall have. That can be no law or custom of parliament which is not grounded on precedents ; and there is none that ever any man's inheritance was determined *per legem et consuetudinem parliamenti*. It is no new thing for our common-law courts to examine matters of this nature, which concern proceedings in parliament ; we do but follow the examples of

THE KING
AND QUEEN
against
KNOWLES.

• [64]

Filing an original against a sitting member has been judged no breach of privilege.

Trinity Term, 6. Will. & Mary, In B. R.

THE KING
AND QUEEN
against
KNOWLES.

* [65]

our predecessors. In the thirty-eighth year of *Edward the Third (a)*, the bishop certified to this court that the father and mother were married, but that the party was born in adultery ; the lords sent a writ to the Judges, and ordered them to judge on the special matter ; but the Judges did not obey. In *Stanton's Case (b)*, * the lords commanded the court of common pleas to give a judgment ; the Chief Justice refused ; afterwards, in his absence, the others complied, and gave judgment ; the king's bench afterwards examined the proceedings of the lords, and adjudged them void ; as appears 15. *Edw. 3.* 1, 2. in the *Oxford Library*. We are not to delay the justice of the land, and the law of it is our rule ; and for these reasons let the indictment be quashed.

But the defendant remained in custody on a second indictment, wherein he was named *Earl of Banbury*.

(a) 38. *Edw. 3.* pl. 14. (b) 15. *Edw. 3.* Fitz, Abrid. "Vouch." 109.

MICHAELMAS

MICHAELMAS TERM,

The Sixth of William and Mary,

IN

The King and Queen's Bench.

Sir John Holt, *Knt. Chief Justice.*

Sir William Gregory, *Knt.*

Sir Giles Eyre, *Knt.*

Sir Samuel Eyre, *Knt.*

} *Justices.*

Sir Edward Ward, *Knt. Attorney General.*

Sir Thomas Trevor, *Knt. Solicitor General.*

Sutton *against* Sparrow.

Case 118.

APPEAL OF MURDER *de morte viri*. It was carried down to be tried at *nisi prius* in *Yorkshire* last assizes, where both parties appeared; but the appellant did not put in the record to try the issue.

And now THE COUNSEL for the defendant moved, that the appeal being not tried, it was either a nonsuit or a discontinuance.

But HOLT, *Chief Justice*, was of opinion, that it was neither; but ordered the appellant to pay costs for not going on to trial,

IT WAS THEN MOVED, that the appellant might be called in; which was done: her attorney appeared for her; which was held sufficient, the appeal being brought by a woman.

Appeal de morte viri carried down to be tried by *nisi prius*; appellant did not put in the record; held neither nonsuit nor discontinuance, but appellant to pay costs.

S. C. Holt, 255. The attorney appearing for the appellant good, being a *fine*.

Crosby's Case.

• [66]

CROSBY was brought to the Bar by a *habeas corpus* the last day of Term.

treason is afresh indicted for the same species of treason, but differently laid; THE COURT inclined he should be bailed, but gave no opinion, but bailed him by their discretionary power.

Case 119. A person indicted above two Terms for S. C. post. 72.

Michaelmas Term, 6. Will. & Mary, In B. R.

CROSBY'S
CASE.

IT WAS PRAYED *on his behalf*, that he might be discharged or bailed, having entered his prayer the first day of *Trinity Term* last, and was indicted the last Term; and afterwards this Term again was indicted for the same species of treason, but never tried on either of them. The Counsel alledged, that the end of the statute was, that no person should be above two Terms under the same accusation; and if a second indictment found should prevent his being set at liberty, at that rate, fresh indictments being found every Term, he will never be discharged, and so the statute would be eluded.

THE ATTORNEY and SOLICITOR GENERAL agreed, if the case had stood singly on the first indictment, he ought to be bailed; but there is another indictment for another treason: the first was for a foreign treason, in conspiring the death of the king, and the overt-act was laid in *Ireland*; but the second is for a treason in *England*.

HOLT, *Chief Justice*. The commitment and both the indictments are for the same species of treason, though the overt-acts are differently laid; but the last indictment agrees exactly with the commitment. Besides, the prayer relates to the commitment, so that the party ought to be tried for the treason for which he is committed within two Terms; and the design of the act was to prevent a man's lying under an accusation for treason, &c. above two Terms.

GILES EYRE, *Justice, acc.*

Postes, Hill.
8. Will. 3. The
King v. Comit.
Ailesbury.

But both declared they would give no opinion in the case, but bailed him by virtue of their discretionary power.

HILARY

HILARY TERM,

The Sixth of William and Mary,

I N

The King and Queen's Bench.

Sir John Holt, *Knt. Chief Justice.*

Sir William Gregory, *Knt.*

Sir Giles Eyre, *Knt.*

Sir Samuel Eyre, *Knt.*

} *Justices.*

Sir Edward Ward, *Knt. Attorney General.*

Sir Thomas Trevor, *Knt. Solicitor General.*

• [67]

* The King against Larwood.

Case 120.

INFORMATION against the defendant, setting forth, that King Henry the Fourth had granted to the city of Norwich to be a county; and that the citizens and community should chuse yearly a mayor and two sheriffs; and that King Charles the Second confirmed the charter of Henry the Fourth, *et ulterius concessit*, that the mayor, sheriffs, and aldermen, should chuse one sheriff, and the citizens and commonalty the other; that the defendant, a freeman of Norwich, was elected sheriff by the mayor, &c. according to the charter of King Charles the Second, and upon notice of it *non præstitit sacramentum officii, nec officium super se assumpsit.* A person may excuse himself for not executing the office of sheriff, on account of his not having taken the sacrament. S. C. 1. Salk. 168. S. C. 3. Salk. 134. S. C. 4. Mod. 270.

The defendant pleads in bar, *quod non cepisset sacramentum cœnæ Domini hic infra annum*, and therefore by the statute of 13. Car. 2. c. 1. *ipse est incapax, et electio vacua, et inde notitiam dedit*; and avers, that *ad generalem sessionem Norwici cepit sacram. secund. 1. Will. & Mary, et subscripsit declarationem secund. 30. Car. 2.* and is an inhabitant of Norwich. S. C. Skin. 574. S. C. Carth. 306. S. C. Holt, 505. S. C. Comb. 315. S. C. 2. Vent. 248. S. C. 1. Ld. Ray. 29.

Replication, that the defendant *ut membrum Ecclesiæ Anglicanæ quolibet anno sacramentum cœnæ Dominicæ cepisse debuisset, et per defectum suum proprium excusari non debet.* 6. Com. Dig. "Viscount" (A. 2.). 4. Bac. Abr. 125. 167. 431. Stra. 1193. Ld. Ray. 1354.

F 3

Rejoinder,

Hilary Term, 6 . Will. & Mary, In B. R.

THE KING ^{against} **LARWOOD.** Rejoinder, *protestando quod non debuit*, &c. he pleads the Act of Indulgence, 1. Will. & Mary, and avers *quod est protestans dissentiens*, &c. and repeats the averments in the bar.

And **SIR SAM. ASHTREE** *pro rege* demurs.

After several arguments at the Bar, it was this Term argued by the Court.

• [68] **THE FIRST EXCEPTION** was taken to the information, that it did not appear by it that the defendant was lawfully chosen sheriff, for *King Henry the Fourth* vested the election in all the * commonalty and citizens, and it is an interest vested in them, which cannot be devested but by forfeiture or surrender. The king by his letters patent cannot do this wrong; and particularly patents of confirmation cannot make this alteration.

But it was resolved by **HOLT**, *Chief Justice*, and **GREGORY**, *Justice* (contra **SAMUEL EYRE**, *Justice*, who held, the acceptance of the second charter by the commonalty did not sufficiently appear), that the first charter had vested the election in the populace, and could not be devested by the second, and placed in a select number, without the assent of all, but by such an assent it might; and that here had appeared a sufficient acceptance, by the election alledged in the information, which is an execution of the constitution in the second charter; and the defendant in pleading does not dispute his election, but insists on his incapacity.

THE SECOND EXCEPTION was taken to the rejoinder, that the statute of Indulgence ought to have been pleaded in bar, and that the pleading it in rejoinder was a departure. The defendant in his rejoinder may make good and fortify the matter in his bar, if it be *ad idem*; as if a statute be pleaded, and he replies that it was repealed, the defendant may in rejoinder shew it revived; but here it does not fortify, but is new and not *ad idem*; for in the bar he insists, that the election is void by the statute 13. Car. 2. and in the rejoinder, though it is not void, which contradicts the bar, yet the Act of Indulgence excuses it; and this was admitted on the defendant's part;

And **RESOLVED BY THE COURT** to be a departure.

THE THIRD EXCEPTION. As to the effect of the Act of Indulgence, whether non-conformity is an offence since the Act of Toleration,

HOLT, *Chief Justice*, and **GILES EYRE**, *Justice*, would not give any opinion, because it was out of the case.

But **SAMUEL EYRE**, *Justice*, declared his opinion, that the statute did excuse the defendant, though otherwise liable.

THE FOURTH EXCEPTION. For the defendant it was urged, that the statute of Indulgence was a general law, which need not be pleaded; and the defendant hath sufficiently shewed himself to be within the qualifications of it by the bar.

But

Hilary Term, 6. Will. & Ma ry, In F. R.

But PER CURIAM, it was resolved, the defendant could not take advantage of the statute without pleading it.

THE KING
against
LAARWOOD.

FIRST, Because it is a private statute (a), and extends only to protestant dissenters, of whom no act before has taken notice.

SECONDLY, Be it a private act or not, the Court cannot take notice whether the defendant be within it or not, if he do not shew himself to be within it, viz. not only that he is a protestant dissenter, but also that he goes to religious meetings, &c.

THE PRINCIPAL POINT was the matter in bar, whether the omission of the sacrament excused the executing of the office upon the statute of 13. Car. 2.

[69]

And it was resolved PER CURIAM,

FIRST, That the king can command the service of his subject, and none can disable himself.

Per HOLT, Chief Justice, and GILES EYRE, Justice, resolved, that the statute was not made to deprive the king of the service of his subjects dissenting, but that they ought to qualify themselves.

GILES EYRE, Justice, resembled it to the case of 23. Eliz. which requires all people to come to church; and held, that an excommunication, which disables a man to come to the congregation, is no plea, because it is in his own default.

On suit on the
statute of 23.
Eliz. for not go-
ing to church,
excommunica-
tion is no plea.

And HOLT, Chief Justice, said, this case shall not be intended better than the defendant has shewed it to be; and therefore he shall not be supposed for any scruple of conscience, but out of a general neglect of all things sacred. That by common intendment all the subjects of England are Christians, and of the National Church; and by the antient canon law, received here as part of the common law, every one ought to receive the sacrament once a year at least; and this is also required by the rubric, which is confirmed by act of parliament, and not doing it is an offence; and this offence, being the neglect and default of the defendant, shall not excuse him from his duty and service to which he is liable by the constitution of the government; and this plea is directly to contradict a maxim of law, that no one shall be admitted to stultify or disable himself. And he said, that in London, and other places, since this statute, dissenters have been elected and submitted to a fine, and never disputed it.

Vide Hard. 406.
2. Rol. Rep. 438.
Brown's Case.

But SAMUEL EYRE, Justice, differed, and said, *nemo debet bis puniri pro eodem delicto*, which here the defendant should be punished on this information for not qualifying. SECONDLY, He shall be punished for the same omission of the sacrament by ecclesiastical censures. THIRDLY, He shall be punished for accepting the office without a qualification.

Judgment was given for the plaintiff (b).

(a) By 19. Geo. 3. c. 44. it is declared to be a public statute.

(b) But see the case of Harrison v. Evans, in which it was solemnly determined, that he may plead the statute 13. Car. 2. and aver that he is a protest-

ant dissenter within the Toleration Act, 1. & 2. Will. & Mary, c. 18. and had not received the sacrament. 2. Burn's E. L. 168. Cowp. 393. 535. 6. Brown's Cases in Parl. 181.

Case 121.

Walker *against* Walker.

Indebitatus assumpsit will not lie for money won at play.

* [70]

S. C. post. 258.
S. C. 5. Mod. 13.
S. C. Comb. 303.
S. C. Holt, 323.
6. Mod. 128.
1. Salk. 22. 125.
Skin. 196.
2. Bac. Abr. 15.
620.
Cowp. 37.
1. Term Rep.
616.

INDEBITATUS ASSUMPSIT, among other things, for money won at play ; and a general verdict.

IT WAS MOVED *in arrest of judgment*, that *indebitatus assumpsit* does not lie ; for though the cast of a die may alter the property, for where the money is staked it is given on a condition precedent, *viz.* the cast of the die, yet this is not a consideration to raise a debt or promise, but it is only a promise against a promise, for which the sole remedy is a special action on the case * upon the mutual promise.

And to that opinion THE COURT strongly inclined, although the case of *Eccleston v. Lewin* was mentioned (a), where it was held a good consideration : and ACHERLY cited *Sherbourn v. Worlich* (b) to be ruled PER CURIAM, that a general *indebitatus assumpsit* lay for money won at play for the hazard ; and *Bret v. Firebrasse* (c) upon the same point in trover : and THE CHIEF JUSTICE cited the case of *Brown v. Ludlow* (d), in HALE's time, where it was adjudged, that an *indebitatus assumpsit* does not lie against an acceptor of a bill of exchange, unless the money was delivered to him to pay over ; and that in that case, if there were effects of the drawer in the hands of the acceptor it was not material ; for it was after verdict, where want of averment of effects in the hand of the acceptor had been aided by intendment, if necessary : but because the point in question was depending in the exchequer-chamber, in the case of *Jackson v. Cottgrave* (e), unresolved, which was for money won on a wager, judgment was stayed here ; and afterwards by the exchequer-chamber, by them, and on advisement with the Judges of the king's bench, it was held, that an *indebitatus assumpsit* would not lie ; and the case of *Jackson v. Cottgrave* was reversed, and so in this judgment never entered (f).

Postea, Mich.
7. Will. 3. Anonymous.

SIR BARTHOLOMEW SHOWER cited a case where *indebitatus assumpsit* lay for the winner against him that held stakes ; *quod* HOLT, Chief Justice, *concessit*.

(a) *Eggleton v. Lewin*, entered Hil. 33. & 34. Car. 2. before PEMBERTON, Chief Justice, and afterwards affirmed in the exchequer-chamber, 3. Lev. 118.

(b) In the common pleas, in Trinity Term, in the second year of *William and Mary*.

(c)

(d) *Brown v. Loudon*, Hard. 485. 2. Keb. 758. 822. 1. Lev. 298. 1. Mod. 285. 1. Vent. 152. 1. Freem. 14.

(e) *Jackson v. Cottgrave*, Michaelmas Term, 3. Will. & Mary, in the king's bench, Roll 610. Carth. 338.

(f) See S. C. post. 258.

E A S T E R T E R M,

The Seventh of William the Third,

I N

The King's Bench.

Sir John Holt, *Knt. Chief Justice.*

Sir William Gregory, *Knt.*

Sir Giles Eyre, *Knt.*

Sir Samuel Eyre, *Knt.*

} *Justices.*

Sir Edward Ward, *Knt. Attorney General.*

Sir Thomas Trevor, *Knt. Solicitor General.*

* [71]

♦ Williams and Others, Executors of Mellys, against Cary. Case 122.

ACTION UPON THE CASE for a false return; whereon they declared, that whereas the plaintiff's testator had recovered a judgment against J. S. for one hundred and forty pounds, and had sued out execution by *feri facias* on this judgment, directed to the defendant, sheriff of *Wilts*; by virtue of which *feri facias* the defendant did levy goods to the value of one hundred and one pounds, but made a return, that he had levied nineteen pounds of the goods of the said J. S. and that he had taken other goods to the value of forty pounds, which remained in his hands *pro defect. emptorum*; and that the said J. S. had *nulla alia seu plura bona*, whereas the defendant did levy goods to the value of one hundred and one pounds, *per quod actionem accrevit.*

IT WAS MOVED *in arrest of judgment*, that no action lay, because it was only a personal tort to the testator, and so not within the equity of the statute *de bonis test. asportat in vitâ.* 4. *Edw. 3. c. 7.* cited. 1. *Roll. Abr. 913.* and *Græ. Car. 297.*

AND IT WAS ADJUDGED, that the action well lay for the executor, being within the equity of the statute.

And

An executor may bring action on the case for a false return to a *fi. fa.* in his testator's time.
S. C. 4. Mod. 403.
S. C. Salk. 12.
S. C. 3 Salk. 149.
S. C. Comb. 264. 322.
S. C. Ho't, 307.
S. C. 1. Ld Ray. 40.
6. Com Dig. "Return" (F. 2.).
1. Bac. Abr. 166.

Easter Term, 7. Will. 3. In B. R.

WILLIAMS
AND OTHERS,
EXECUTORS OF
MEILLYS,
against
CARY.

* [72]

HOLT, Chief Justice. An action upon the case lies for an executor upon this statute, for an escape out of execution in the testator's time; though it is a doubt in the Books, whether such an action lies for an executor, in case of an escape upon mesne process in the testator's time (*a*): that if the sheriff take goods in execution on a *fieri facias*, they are now in the sheriff's hands for the plaintiff's use, and so are as part of the plaintiff's personal estate; and if the sheriff afterwards return *nulla bona*, the plaintiff cannot have any benefit of the goods, * but the defendant in the *fieri facias* will have good title to the goods by the estoppel occasioned by the return; and the plaintiff is wronged as to that which is part of his personal estate. But on escape of the mesne process there is only the loss of the process (*b*).

(*a*) *Mason v. Dixon*, 1. Jones, 142.

(*b*) Judgment was given for the plaintiff, S. C. 4. Mod. 404.

Case 123.

The King against Crosby.

Whether infamy arises from the crime or punishment. *Quere.*

CROSBY was tried for high treason; and *Aaron Smith* was produced as a witness. *Smith* had stood in THE PILLORY for giving instructions to *Stephen Colledge*.

S. C. 5. Mod. 15.
S. C. Skin. 578.
S. C. Salk. 689.
S. C. Holt, 753.
3. Inst. 33, 34.
1. Hale, 304.
Gibb. L. E. 140.

It was objected, that he was not a good witness.

SAMUEL EYRE, Justice, said, his opinion had always been, that the disability follows the infamy of the fact, not of the punishment; but waiving that, *Smith* was a good witness by the late act of pardon (*a*).

HOLT, Chief Justice. Though the pardon does not take away the former disability, as a reversal of a judgment does, yet it gives him an ability *de novo* (*b*). But he intimated his opinion to be, that the disability followed the infamy of the punishment (*c*).

Comparison of hands no foundation for attainer, but may be used as circumstantial evidence.

At this trial, several treasonable papers were produced, which they swore they believed to be the hand-writing of the prisoner.

And on this a question arose, Whether comparison of hands were sufficient?

PER CURIAM. It is not sufficient for the original foundation of an attainer, but may be well used as a circumstantial and confirming evidence, if the fact be otherwise fully proved; as in my *Lord Preston's Case* (*d*), his attempting to go with them into *France*, and principally where they were found on his person; but

(*a*) See *Rex v. Warden of the Fleet*, post. 340.

(*b*) See the case of *Cuddington v. Wilkins*, Hob. 67. 82. and *Reilly's Case*, Cases in Cro. Law, 2d edit. 362.

(*c*) It is now settled, that it is the infamy of the crime, and not the nature or the mode of punishment, that destroys the competency of the offender as a witness,

Pendock v. Mackender, 2. Wilson, 12. — See also *Rex v. Davis*, 5. Mod. 75. *Walker v. Kearney*, 2. Stra. 1142. *Carter's Case*, 2. Salk. 461. *Rex v. Edwards*, 4. Term Rep. 440. — But by 31. Geo. 3. c. 35. no person shall be an incompetent witness by reason of a conviction of petty larceny.

(*d*) 4. State Trials, 440 447.

here,

Easter Term, 7. Will. 3. In B. R.

here, since they were found elsewhere, to convict on a similitude of hands was to run into the error of *Colonel Sidney's Case* (a). THE KING
against
CROSBY.

(a) 3. State Trials, 802.—But see Rivet v. Braham, 4. Term Rep. 497.
upon this subject, Francia's Case, 6. St. 4. Hawk. P. C. 7th edit. ch. 46. f. 52. to
Tr. 63. Laver's Case, 6. St. Tr. 275, 57. Foster's Discourse of High Treason,
276. Dr. Henzey's Case, 2. Burr. 644. 198. 218.
Stranger v. Scarlet, Espinass, N. P. 14.

Anonymous.

Case 124.

HOLT, Chief Justice. One must plead *tout temps prist* always *Tout temps prest*, before imparlance (a).

(a) Anonymous, ante, 8.

Anonymous.

Case 125.

HOLT, Chief Justice. If you bring debt, or annuity, and part of the quaræ be paid, you must acknowledge satisfaction for that, and declare for the residue (a). Where the debt
is entire, satis-
faction must be
acknowledged
for the residue.

(a) Johnston v. Baynes, post. 84. Hawkins v. Gardner, post. 213.

TRINITY TERM,

The Seventh of William the Third,

I N

The King's Bench.

Sir John Holt, Knt. Chief Justice.

Sir William Gregory, Knt.

Sir Giles Eyre, Knt.

Sir Samuel Eyre, Knt.

} *Justices.*

Sir Thomas Trevor, Knt. Attorney General.

John Hawles, Esq. Solicitor General.

* [73]

Case 126.

* Anonymous.

Arrest.

See the case of
Lee v. Gansell,
Cowp. 1.

HOLT, *Chief Justice*. If a bailiff find an outward door open, he may break open all the inner doors to come at the party whom he hath a warrant to arrest.

Case 127.

Sir John Dalston against Eyenston.

Tort and con-
tract cannot be
joined.

S. C. 1. Salk. 10.
S. C. 5. Med. 90.
S. C. Comb. 333.
S. C. 3. Salk.
204.

S. C. 1. Ld. Ray.
58.

S. C. 3. Ld. Ray. 115.

IT WAS MOVED in arrest of judgment, that two several actions of different natures were joined together, *videlicet*, an action on the custom against a carrier, and trover, wherein the "not guilty" is the issue to both, yet must be separately laid, as in *Sid.* 244.

And IT WAS ADJUDGED in *Michaelmas Term* after, that an action on a *tort* and on a *contract* cannot be laid together.

And the judgment was arrested (a).

(a) But it is now settled, that an action against a common carrier on the custom of the realm and an action of trover may be joined in the same decla-

ration, *Dickson v. Clifton*, 2. Will. 319. *Bedford v. Alcock*, 1. Will. 252. *Mast v. Goodson*, 2. Bl. Rep. 848. and *Brown v. Dixon*, 1. Term Rep. 274.

Anonymous.

Trinity Term, 7. Will. 3. In B. R.

Anonymous.

Cafe 128.

PER CURIAM. A double plea is no exception on a general demurrer, but it must be specially demurred to. 1. Saund. 337.

Anonymous.

Cafe 129.

HOLT, Chief Justice. If a bailiff having a warrant from the sheriff on a *capias* send another in his room to arrest the person, such arrest is illegal. A bailiff cannot depute a person to make an arrest.

Anonymous.

Cafe 130.

PER CURIAM. If a man be in custody of the marshal on a *reddidit se*, you may charge him on the *reddidit se* in execution with the marshal, without making the marshal acknowledge him in court to be in his custody: but if he be in execution, you shall not charge him till acknowledged. How a prisoner on *meine* process may be charged in execution.

Anonymous.

Cafe 131.

HOLT, Chief Justice. A rent may be reserved on words of covenant; but where there is a rent reserved, and a covenant also for other money in the same deed, debt will not lie for the latter: as if I demise twenty acres, reserving twenty pounds a-year, and further agree with him in the same deed, that for as many acres as he shall plow up he shall give ten shillings more for each *per annum*; this last sum is no rent, and an action of debt will not lie for it. A rent may be reserved on words of covenant. * [74]

Kirkham *against* Wheely.

Cafe 132.

ACTION QUI TAM. The defendant pleaded, that he was an attorney of the common pleas, and that all attornies of the common pleas have not been sued anywhere else than in the common pleas. The plaintiff demurred. In an action *qui tam* the defendant may plead privilege in the negative.

And it was said, that he should not have pleaded it in the negative, and that he should have made a *full defence*, whereas he only said, "*venit et dicit*"; and this being for THE KING, as well as for the party, he may sue in what court he pleases. S. C. 1. Ld. Ray. 27. S. C. 1. Salk. 30. S. C. 2. Salk.

PER CURIAM. Pleading in the negative is well enough, because there is jurisdiction enough given thereby to the common pleas. If indeed it had been an exception issuable in fact, the negative could not have been so well, because an affirmative ought to be set forth to make a traverse; but here the matter is not traversable, not being triable *per pais*, but a matter in law. 543. S. C. 3. Salk. 282. S. C. Comb. 319.

SECONDLY, "*venit et dicit*" is a sufficient defence, according to 14. Hen. 6. 13. 19.

THIRDLY,

Trinity Term, 7. Will. 3. In B. R.

**KIRKHAM
against
WHEELY.**

THIRDLY, The king may sue in any court, but an informer cannot ; and a prosecutor *qui tam* has been looked on as no other than common informers (a) ; for in case the plaintiff should die, there is an end of the suit, and the king is intitled to a recovery.

But for another exception it was afterwards adjudged insufficient.

Quare, what it was.

(a) See Lutw. 196. 3. Lev. 398. where all the cases on this subject are Cowp. 322. 366. 744. and the note to Mr. Evans's edition of Salkeld, page 30. collected.

Cafe 133.

The King *against* Bythell.

A good judgment returned, though the return not good ; so would not discharge him, and this return was made, that he was committed to him, keeper of *Newgate*, by order of the court of sessions, "*cujus tenor, &c. WILL. BYTHELL convictus fuit, &c. ideo considerat. est per Cur. &c. et quod ibid. SCILICET, in the custody of the keeper of Newgate, in gaolâ sub salvâ custodiâ quousq. finem perfolvat.*"

• [75]

S.C. 5 Mod. 19.
S. C. Salk. 348.
S. C. Holt, 145.
S. C. 1. Ld. Ray.
47.
1. Salk. 149.
2. Mod. 118.
184.
Stiles, 147.
Stra. 915.
4. Com. Dig.
" Habeas Cor-
pus" (E. 2).
3. Bac. Abr. 15.
1. Hale, 584.
2. Hale, 144.
3. Term Rep.
255.

And it was moved he might * be discharged or bailed, because no legal commitment appears by the return, for the word "*com-mittitur*" is not there ; and if the form of the commitment were legal, yet here is no legal officer to whom he is committed, for the commitment is " to the gaol or gaoler of *Newgate*," whereas it ought to have been to the sheriff, for he is the immediate officer to the court.

But *PER CURIAM*, He shall be remanded.

SAMUEL EYRE, Justice. The return is not good ; but here is enough to remand him, for there is a good judgment returned ; and if by an informal return, where judgment appears good, we should discharge him, we should at that rate rid all the gaols in *England* ; and he cited *Marich*, 52. there was a *habeas corpus* " to the porter of *Ludlow* ;" and on the return, though it appeared the damages given were beyond the instructions of the Council of the *Marches*, by whom judgment was given, yet because a fine was set on them to the king, and that remained unpaid, the Court remanded them ; and so here, a fine being set, the king would lose by this discharge.

HOLT, Chief Justice. The commitment is not so regular as it ought to be, for he should have been committed " to the sheriff," and by the very word "*committitur* ;" but yet it appears he is committed by a court that has jurisdiction, for a very good cause. Now though the gaoler be not a proper officer, by law, to have the commitment of him formally, yet actually he is so, and the law takes notice of him. If he suffer a voluntary escape of a criminal, it is criminal

Postea Hil.
8 Will. 3. The
King v. Clerk.

Trinity Term, 7. Will. 3. In B. R.

criminal in him, and not in the sheriff; and all commitments of felons by justices of peace are to the gaolers: but when the party comes to be tried, he is always supposed to be in custody of the sheriff. And it has been a question, If the gaoler suffer an escape in a civil action, whether he is not liable to the party's action of debt for escape as well as the sheriff? *Hard. 29.* Now the question is, Whether he shall be delivered on a *habeas corpus*, or put to his writ of error? In *Busbell's Case*, which was the first where any was delivered by *habeas corpus* from a commitment of justices of *oyer* and *terminer*, the commitment was not good in the merits of the cause; but here it is otherwise. Then for the word "*remaneat*," that is improper; it should have been "*committitur*;" for though it appears by the return, that he was in prison before, yet it might have been for another cause; but the cause for which he was imprisoned being a good cause, by a court that has jurisdiction, though an improper word be used, it is not proper to discharge him on this return of * the gaoler; but if it be so on record, he may have a writ of error.

THE KING
against
BYRNELL.

Postea, Mich.
10. Will. 3.
The King v.
Fell, Keeper of
Newgate, cont.

Vide Vaugh.
135.
Postea, Pasch.
12. Will. 3. Dr.
Greenville v.
College of Phy-
sicians.

* [76]

Anonymous.

Case 134.

PER HOLT, Chief Justice. If a cause of action arise partly in one county and partly in another, it is in the election of the plaintiff to lay it in which county he pleases: as if a country chapman send a letter to a tradesman in *London* to send him goods into the country, he delivers them accordingly, and they come to the chapman's hands, there the cause of action arising in both counties, he may lay them in either (a).

Where cause of
action arises in
two counties, it
may be laid in
either.

s. Roll. Abr.
601. 607.
Hob. 330.

1. Salk. 174. 2. Salk. 669. 2. Term Rep. 238. 241. 3. Term Rep. 387. 652.

(a) See *Scott & Tann v. Brett*, 2. Term Rep. 238. *Mellor v. Barber*, 3. Term Rep. 387.

Anonymous.

Case 135.

PER HOLT, Chief Justice. As a sheriff is not bound to execute writs in person, but may under hand and seal direct his warrant to under bailiffs, so the bailiff of a liberty may do the same; but then no servant of the under-bailiff can execute a warrant, but it must be by the bailiff himself to whom the warrant is directed (a).

Bailiff to whom
writ is directed
must execute it
himself.

(a) Ante, 73.

Walker again;? Rumbald.

Case 136.

TROVER AND CONVERSION. Special verdict, that one *J. S.* Distress taken made a lease for years of lands in two hundreds, rendering by the bailiff of the hundred of the hundred of *A.* and *B.* sold by the bailiff of *A.* in the hundred of *B.* having given personal notice, good, being an entire distress: and personal notice is more than the act requires, and answers the intent of it.—S. C. 4. Mod. 390. S. C. Salk. 247. S. C. Comb. 336. S. C. 2. Ld. Ray. 53. S. C. 3. Ld. Ray. 108.

cattle

Trinity Term, 7. Will. 3. In B. R.

WALKER
against
RUMFOLD.

cattle as *levant et couchant*, and therefore gave personal notice the same day to the plaintiff, as owner of the said cattle ; and that the plaintiff did not replevy them in five days ; that then the defendant, the constable of the hundred, took the distress, and in the presence of the constable of the hundred of *Andover* did cause it to be appraised, by two appraisers, in the hundred of *Kinnerly* ; and after the appraisement sold the same.

And on the statute of 2. *Will. & Mary*, of Distress, it was objected :

FIRST, The jury have only found a personal notice, which is not notice within the statute ; for the notice prescribed, required, is at the mansion-house or most notorious place on the premises.

BUT PER CURIAM, The intent was only to give a certain notice ; and seeing in this case they have gone farther than the letter of the act, a personal notice must needs be sufficient.

SECONDLY, Notice was only given to the owner of the goods, and not to the tenant in possession.

BUT PER CURIAM, The words of the statute are in the disjunctive, and notice to either is sufficient.

• [77]

THIRDLY, The constable of *Kinnerly* administered the oath, and caused the *goods to be appraised and sold only in the presence of the constable of the hundred of *Andover* ; whereas the act is express, that the appraisement and sale must be by the constable of the hundred, parish, or place, where the distress is taken ; and that the said constable must be aiding and assisting therein, which is more than to stand by and be simply present.

BUT PER CURIAM, It appears the distress is entire, being at one time, and the land being contiguous ; and then where such lands are in two counties, and the goods are distrained for one entire rent out of these lands, this is one distress ; and by 1. & 2. *Phil. & Mary*, c. 12. they ought to be in one pound : and whereas it is urged, the appraisement must be made by the officers of the parish or hundred where the distress is taken ; to that it was said, that the continuing and driving them to the pound is a taking ; as *Latch*, 60. (a).

Judgment for the defendant.

(a) See 2. Will. 354. 3. Will. 295.

Case 137.

Anonymous.

Postea, Trin.
3 Will 3. The
King v. Walker

PER CURIAM. A jointenant, without any authority from his companion, may *distrain* for the whole rent ; but he must particularly *avow* in his own right, and as bailiff of the other.

The

Trinity Term, 7. Will. 3. In B. R.

The King and Queen against Kemp.

Case 138.

SCIRE FACIAS OUT OF THE PETTY-BAG OFFICE, to shew cause why a patent of the twenty-seventh year of *Charles the Second*, to *Kemp*, of the office of searcher to the port of *Plymouth*, should not be repealed.

The case was: *King Charles the Second*, the twenty-fifth of *July*, in the twelfth year of his reign, by letters patent granted; *durante bene placito*, to *John Martin*, the office of searcher; and afterwards, by letters patent, on the nineteenth of *June*, in the twenty-fifth year of his reign, reciting the former grant, granted to *William Fryar*, for his life, the same office from and after the death, surrender, or forfeiture of *Martin*; after which *Fryar* surrendered his letters patent; and in consideration of that surrender, the king, by other letters patent, the twenty-fourth of *December*, in the twenty-seventh year of his reign, granted this office to *H. Kemp* for life, from and after the death, surrender, or forfeiture of *Martin*; and then, in the same letters patent, reciting all other grants, granted the said office to *R. K.* for his life; from the death, surrender, or forfeiture of *H. Kemp*, or any other way or means by which the office might come into the king's hands or disposition.

And the question was, Whether these letters patent to *Kemp* were good? the validity whereof depended on the grant to *Fryar*; for if the grant * to him be void, the king would be deceived in the consideration of his grant to *Kemp*, which was the surrender of *Fryar's* letters patent.

And it was adjudged for the defendant by **SAMUEL EYRE, Justice**, and **HOLT, Chief Justice**, and that the letters patent to *Fryar* were good.

EYRE, Justice. There have been two objections made: **FIRST**, That an estate for life cannot depend on an estate at will. **SECONDLY**, That *Fryar's* estate cannot by rule of law commence after the death, surrender, or forfeiture, of any estate at will which *Martin* had.

As to **THE FIRST**: This is not like a grant of lands which are in being, wherein a freehold may take in possession, or be supported by a particular estate in being. This office is no longer in being than it is granted by the king.

As to **THE SECOND**: *Fryar's* estate may have a good commencement, though it be objected, that the king was deceived in his grant. This difference is to be observed in all cases where the king is said to be deceived in his grant: If the matter which is false in the letters patent be suggested on the part of the grantee, and that to the prejudice of the king, there the king shall be said to be deceived in his grant, so as to make it void; but where the words of the letters patent are words of the king, although the king appear by his inference to be mistaken even in the law, yet the

Grant of an office by the king, after the death, surrender, or forfeiture, of the former grant of the same office, is good.

S. C. 4. Mod.

275.

S. C. 2. Salk.

465.

S. C. Comb. 334.

S. C. Skin. 445.

580.

S. C. Carth. 350.

S. C. Holt, 419.

S. C. 1. Ld. Ray.

49.

4. Co. 4.

Co. Lit. 3.

Hob. 203.

Str. 43.

2. Will. 166.

2. Bl. Com. 314.

3. Bac. Abr.

725.

4. Bac. Abr.

206. 211. 296.

* [78]

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Vide Yelv. 48.
2. Cro. 34.
Mob. 229, 230.

* [79]

king shall not be said to be deceived, so as to avoid his grant. If the king grant an estate in possession, when he intends only to grant it in reversion; or where the thing granted is of a greater value than it appears in the grant to be of; these are the suggestions of the grantee, and the death of the king in these cases shall make the grant void: but if the king be not deceived by any matter suggested by the grantee, but is only mistaken in his own affirmation or surmises, although it be in the law itself, such grants are good, and such construction of them shall be made as tend to their support; and upon this difference the Books are plentiful. 8. Hen. 7. 3. Dyer, 197. b. 352. a. 2. Cro. 34. 2. Brownl. 242. 11. Co. Auditor Curt's Case. Mod. Rep. 197. So that where he is not so deceived the grant shall not be void, if by any construction it can be made good. Now to apply this aptly; the king is not here any way deceived in his grant, for the precedent letters patent are truly recited; the suggestion of the party is true; the king did intend to grant this office to Fryar, only here is an improper limitation of the commencement to be after the death, surrender, or forfeiture of Martin; but these are the words of the king, and if they may have any good * construction they ought to take effect: the intent of the king seems to have been, that Martin should have an estate for life, and the new grant take effect after his death; and there is no reason why the grant of an office may not take effect after the death of tenant at will, because the place may by possibility determine after his death. But suppose the commencement wholly void, as no commencement at all, yet the king's mind appearing it shall commence on the determination of Martin's grant, whensoever it happens, according to the opinion in 8. Co. Earl of Rutland's Case.

Estate at will of
lands no surren-
derable estate,
because at the
will of both par-
ties.

Grant of office
at will by the
king is only at
will of the king;
for if it be an
office of trust for
the king, the
person is fine-
able for refusal of
it.

HOLT, Chief Justice. The grant to Fryar is good. It has been said to be void, because it is made to begin on the death, &c. of Martin. Now as for the death of Martin, that is certainly good, because it might well enough commence from thence. The next thing is, whether it can commence from the surrender; for it has been insisted on, that an estate at will might not be surrenderable; and it is very true, that an estate at will in lands between common persons is not a surrenderable estate, because it is at the will of both parties, and either party may determine his will without the formality of a surrender; and therefore there is no surrender at all in law of an estate at will in lands between common persons. But when the king grants an office at will, that is not at the will of both parties, it is only at the will of the king to determine the interest in the office; that the grantee holds of the king without any surrender; for if it be an office of trust, for the profit of the king, he is punishable by fine for the refusal of it; and of that he cannot divest himself without an actual surrender, though it need not be proved: so it was done by two Chief Justices, HALE and PEMBERTON, who had an estate at will in their offices, and made an actual formal surrender by deed inrolled in chancery; and if the king determine his pleasure, it must be by writ of discharge under the great seal, or by constituting

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constituting a new person. Then on the commencing on the forfeiture of *Martin* it is said, that a tenant at will cannot forfeit his estate, but only determine his will. Now I say, the king's tenant at will may forfeit; for it may be the king's will not to determine the estate until a forfeiture; he will first inform himself by inquisition on record, whether the party has well behaved himself or no, before he will determine his interest; which was *Sir J. Savage's Case*. When there is a conviction on record it is a forfeiture, though if he be an officer for life there must be a *scire facias*. But suppose the king should determine his will during the life of *Martin* without surrender or forfeiture, then *Fryar's* grant shall not commence during the life of *Martin*, and in the mean time the king may grant it to whom he pleases. But then the question arises, If the king can grant an office to commence *in futuro*, when there is no other estate in being to continue until the office shall take effect? or, Whether the king grant an office to commence on a contingency, a year hence, or the like? AND I AM OF OPINION he may; for though a freehold cannot commence *in futuro*, that is to be understood where it is derived out of an inheritance. If there be an office in fee, and the king has the inheritance, there a freehold can no more commence *in futuro* by letters patent than by livery of seisin: so is *5. Co. Berwick's Case*. But if it be a new thing created by the king, he may constitute it in what manner he pleases; as a rent *de novo* may be granted and created to commence *in futuro*, or on a contingency; as in the case of *Edward the Second* quoted in *Corbet's Case*, 1. Co. 87. for it is a creature of his own, and he may dispose of it as he pleases. Now though there were such an officer as a searcher, yet in regard there was no estate at all therein, but it remained in the king to create an estate, the estate the king gives is a new estate, and therefore subject to such a disposition as he thinks fit. It is true, there are not many precedents of such dispositions until of late days; but why a grant *in futuro* should not be good in such a case as this is, it would be hard to assign a cause; and therefore

THE KING
AND QUEEN
against
KEMP.

* [80]

Freehold, though to commence *in futuro*, good, if not derived out of an inheritance.

Things *de novo* created may be granted on any contingency.

Judgment for the defendant.

MICHAELMAS TERM,

The Seventh of William the Third,

IN

The King's Bench.

Sir John Holt, Knt. Chief Justice.

Sir William Gregory, Knt.

Sir Thomas Rokeby, Knt.

Sir Samuel Eyre, Knt.

} *Justices.*

Sir Thomas Trevor, Knt. Attorney General.

John Hawles, Esq. Solicitor General.

• [81]

Case 139.

• Anonymous.

No *indebitatus assumpsit* lies for money won at play.

Ante, 70.

3. Lev. 118.

PER HOLT, *Chief Justice.* No *indebitatus assumpsit* lies for money won at play; for money staked on a wager it does, but not otherwise; for when the money is in the custody of a third person, there the winning the wager determines whose property it shall be.

Case 140.

St. Leger against Pope.

Debt, with averment, different from condition on a bond.

S. C. 1. Lutw.

484.

S. C. N. Lut.

147.

S. C. 4. Mod.

409. S. C. 5. Mod. 4. S. C. Salk. 344. S. C. Comb. 327. S. C. Skin. 572. S. C. Carth. 322.

Foreign coin.

HOLT, *Chief Justice.* Debt with an averment in the declaration differs from the condition of a bond; for the plaintiff here must fully intitle himself to an action, but the condition of a bond goes only in defeasance, and must come on the part of the defendant; and he says here, the plaintiff does not intitle himself to any action, for he has no cause of action, unless the hundred guineas as well as the value were unpaid.

Where foreign coin itself is demanded, the action is in the *detinet*, but if the value be demanded, it is in the *debet et detinet*; and the averment

Michaelmas Term, 7. Will. 3. In B. R.

avermment always is, that the defendant hath neither rendered the foreign coin nor the value.

ST. LEON
against
POPE.

* [82]
Case 141.

* The King against Row and Kendall.

MOTION to discharge *Row* and *Kendall*, committed by THE SECRETARY OF STATE, being charged with high treason, in being privy to and assisting the escape of *Sir James Montgomery* out of the custody of one *William Sutton*, one of the king's messengers in ordinary, and charged with high treason.

Commitment to a messenger by secretary of state good.

S. C. 5. Mod. 78.
S. C. 1. Salk. 347.
S. C. Comb. 343.
S. C. Holt, 144.
S. C. Skin. 596.
S. C. 1. Ld. Ray. 65.

HOLT, Chief Justice. The power of the secretary was never questioned until lately; and as for his commitment to A MESSENGER, it is good; for he may be committed for a time to any-body while he is under examination; but though for that cause this commitment had been irregular, it is a question if it would not have been void.

S. C. 4. St. Tr. 854.

ROKEBY, Justice, said, that as to THE MESSENGER he may be taken as a carrier of him to prison, and so good.

1. Leon. 71.
2. Leon. 175.

4. Com. Dig. 8vo. 333. 5. Com. Dig. 8vo. 140. 1. Bac. Abr. 224. 378. 3. Hawk. P. C. ch. 13. l. 66. ch. 16. l. 4. 2. Will. 204. 244. 275. 283. 3. Burr. 1742. 3. Hawk. ch. 13. l. 18. and the case of *Exwick v. Carrington*, 11. State Tr. 316.

THEN IT WAS EXCEPTED, that the warrant does not shew for what treason *Sir J. Montgomery* had been committed; and so it might have been for counterfeiting THE GREAT SEAL, and then no treason to receive him (a). So receiving a jesuit is no treason, but made felony by 27. Eliz.

In a warrant for high treason, the species of treason must be expressed.

HOLT, Chief Justice. If an act of parliament make a felony, accessaries before and after are felons, though not mentioned; and here he is affected with the treason of *Sir James*.

Skin. 596.
2. Will. 158.
1. Burr. 460.
1. Stra. 2.
3. Viner Abr.

EYRE and Rokeby, Justices. The species of *Sir James Montgomery's* treason ought to be expressed; and for want of that they shall be bailed (b):

513

And so they were.

(a) 12. Co. 81. 334. Rex v. Wyndham, 1. Stra. 3.
(b) See the case of Mr. Harvey of Rex v. Wilkes, 2. Will. 158. and Coombe, 10. Mod. 334. 3. Viner Abr. 3. Hawk. P. C. ch. 16. l. 17.

Herman against Denuc.

Case 142.

NORTHEY moved on the statute of 22. Car. 2. c. 11. about the rates for repairing the church of *St. Switbin*.

Union of parishes before and since the fire of London.

And per **HOLT, Chief Justice**, **ROKEBY** and **EYRE, Justices**, At common law there might be a union, but that was only of churches, and but as an appropriation of one rectory to another, but still the parishes were distinct; and that did not make the parish-church of *A.* to be the parish-church of *B.* but the incum-

S. C. Holt, 322.

Michaelmas Term, 7. Will. 3. In B. R.

HERMAN
against
DENUB.

bent was as well incumbent of *B.* as *A.* and is obliged to serve the cure, if necessary. But by this statute, the parish-church of *St. Swithin* is the parish-church of *St. Mary Bothaw*, and the other church is thereby destroyed; and therefore that parish must repair *St. Swithin's*; the rates are made distinct in this case; which THE COURT seemed to approve.

* [83]

Case 143.

* Price and Others against Rouse.

Parson, and not
parishioners, to
repair the
church.

ROUSE, churchwarden, and others, libelled in the spiritual court for their proportion of a church-rate for repairing the chancel and church, whereas the parson *de communi jure* ought to repair the chancel; and no distinction being made, prohibition ought to go to the whole,

PER CURIAM. Let it be so; of common right, that is by the antient canon and civil law, the parson ought to have repaired the whole church; and it is by the custom of *England* only that the parish repairs the body.

Case 144.

Anonymous.

Apprentice
should be dis-
charged under
hands and seals
of four justices;
but on certiorari
to remove an order,

IF AN APPRENTICE be discharged from his master, the statute requires the discharge to be under the hands and seals of four justices of peace: but in a *certiorari* to remove an order of sessions thereon, it is sufficient if the order take notice of the discharge so made, and it is not necessary to certify the discharge itself, but on *certiorari* to remove an order, not necessary to certify the discharge.

Case 145. Bower and his Wife against Coke, Executrix of Coke.

Plea that de-
fendant was
administratrix
and not executor
is a good plea in
abatement, but
should conclude
quod billa cassetur,
elic ill.

DEBT UPON A BOND against the defendant as executrix of her husband. She pleaded, that he died intestate, and that administration was committed to her, &c. *Unde petit jud. si ipsa ad "bill. præd. respondere compelli debeat."*

Exception was, that the defendant did not traverse, *ABSQUE HOC* that she administered as executrix,

PER CURIAM. This plea is better without a *traverse*, for he shews the plaintiff in what manner he is chargeable; he has confessed and avoided all the plea, and has shewn that a rightful administration was committed. It is a foreign intendment that he has administered any other way; and if he has so done, you should have come in and shewed it in your replication. But then this conclusion is ill in abatement; every plea should have its proper conclusion; this should be *quod billa cassetur*. It is indeed a good plea to the jurisdiction of the court; but not in this case.

And a *respondens ouster* was awarded (a).

S. C. 5. Mod.
136. 145.
S. C. Salk. 298.
S. C. Carth. 363.
S. C. Holt, 307.
556.
Akte 46.
Cro. Eliz. 308.
565. 810.
3 Leon. 197.
8 Mod. 301.
Cart. 99.
1. Bac. Abr. 15.

(a) See *Linden v. Bleffingham*, Corn. Rep. 97. *Edwards v. Harben*, 2. Term Rep. 155. *Pagett v. Priest*, 2. Term Rep. 597.

Johnson

* Johnson against Baynes.

Case 146.

DEMURRER ON REPLICATION, because the avowry was only for part of the rent, without shewing how the rest was satisfied.

In avowry for part of a rent, how the rest was satisfied must be shewn.

HOLT, Chief Justice. If a rent of a quarter be twenty pounds, and you avow only for ten pounds, you must shew how the rest is satisfied, just as in a declaration for part of a debt due upon a bond; and for this the case of *Holt v. Sambach* (a) is clear.

S. C. Comb. 346.
S. C. 5. Mod. 77
S. C. Holt, 553.

(a) 1. Cro. 103, 104.—See also Anonymous, ante, 72. Hawkins v. Gardner, post, 273.

Wigmore against Veal.

Case 147.

A TENDER cannot be pleaded after imparlance; it is no bar to the action, and only excuses the penalty; and therefore in pleading a tender, you must plead *touts temps prius*, and conclude *petit judicium de damnis*, which can never be after imparlance.

the penalty. Ante, 8. 72.

Anonymous.

Case 148.

IF A FIERI FACIAS be taken out and renewed within a year, and so within every year, you may enter your mean continuances.

Postea, Pasch. 12. Will. 3. Parmenter v. Johnson.

Lord Gerrard against Lady Gerrard.

Case 149.

ERROR OF A JUDGMENT in dower from the court of common pleas.

None nor dowable of caput baronie, but of a capital messuage shall.

THE QUESTION was, Whether *Lady Gerrard* were dowable of *Brownley-Hall*, being pleaded to be *caput baron*?

And **PER CURIAM**, There are three sorts of barons, viz. by tenure, by writ, and by patent. The first, which were feudal barons, held a certain territory of land *per baron*, wherein there was a castle, whereunto all the inhabitants in time of war resorted, and these were the *capita baronia*; and there was no dower of them, because they were for defence. By custom, we call noblemen barons of such a place, but that is no barony; for a real barony is when the king grants lands, rents, &c. to be held *per baron*, none of which have been granted since the time of *King Richard the Second*.

S. C. 5. Mod. 64.
S. C. 1. Lev. 407.
S. C. 1. Salk. 54. 353.
S. C. Holt, 260.
S. C. 1. Ld. Ray. 72.
S. C. Comb. 352.
S. C. Skin. 592.
Ante, 59.
Co. Lit. 30.
3. Com. Dig.
"Dower" (A. 8)

* Herbert against Walters.

* [85]

Case 150.

REPLEVIN. The defendant avowed, as overseer of the poor, on the 43. Eliz. c. 2. the plaintiff was nonsuited, and the jury omitted to enquire of damages.

Where jury not charged with enquiry of damages may be

supplied by writ of enquiry: and wherever an attain lies not, an omission may be supplied by writ of enquiry.—S. C. 1. Salk. 205. S. C. Comb. 344. S. C. Skin. 395. S. C. Carth. 362. S. C. Holt, 191. S. C. Ld. Ray. 59. S. C. 5. Mod. 118. 10. Co. 119. Comb. 11. Skin. 595.

Michaelmas Term, 7. Will. 3. In B. R.

HEBERT
against
WALTERS.

The question was, Whether this omission could be supplied by a writ of enquiry within the last paragraph of the statute?

HOLT, *Chief Justice*, delivered the opinion of the Court that it might. It is true, if there be an issue, and the jury find the issue and omit to enquire of damages, that cannot be supplied by a writ of enquiry, for the jury have discharged themselves; for the finding of damages was part of their issue; but here is no omission, the jury was not charged, and therefore a writ of enquiry may go. Besides, after verdict damages cannot be supplied by a writ of enquiry, because the party would lose his remedy by writ of attain, which lies not in this case; and so is 1. Cro. 143. *Durroffe v. Newbott*, 1. Roll. Rep. 272. *Brampton's Case*, 2. Roll. Rep. 112. 1. Sid. 380. This has been the difference taken in all cases, that where no attain lies, an omission may be supplied by writ of enquiry; and therefore let it go here (a).

(a) See *Valentine v. Fawcett*, 2. Stra. Lady Archer, 2. Bl. Rep. 763. and 5. 1021. *Dewell v. Marshall*, 2. Bl. Rep. Com. Dig. "Pleader" (Z. 1.). 921. S. C. 3. Will. 442. *Freeman v.*

Case 151.

Young against Rud.

Whatever is given in satisfaction must be taken in satisfaction.

ASSUMPSIT FOR GOODS SOLD. The defendant pleaded, that he gave him a beaver in satisfaction, and that he accepted it in satisfaction. The plaintiff replied by protestation, that he did not give it in satisfaction, ABSQUE HOC that he did not receive it in satisfaction.

S. C. 5. Mod. 86.

S. C. 2. Salk. 627.

S. C. Comb. 346.

S. C. 1. Id. Ray.

60.

S. C. Carth.

347. 9. Co. 80.

2. Term Rep. 24.

PER CURIAM. Pleading the giving in satisfaction without the receiving in satisfaction is not sufficient, for there must be a mutual act done; one must give, and the other must take; and in this case either of them are traversable.

Judgment was given for the plaintiff (a).

Winch, 76. Cro. Eliz. 68. Stra. 573. 1. Com. Dig. "Accord" (C.).

(a) See *Paine v. Masters*, 1. Stra. 573.

Case 152.

Stayner against The Burgesses of Diotwisch.

Camden's Britannia, to prove a particular custom, in evidence is refused.

UPON A TRIAL AT BAR (a), *Camden's Britannia* was offered in evidence to prove a particular custom.

BUT THE COURT would not admit it; for general history that relates to the whole kingdom is proper to be given in evidence in a matter relating thereunto; and the nature of the thing requires it

S. C. 1. Salk.

281.

6. Mod. 225. 248

1. Lev. 25.

Blond. 426. Yelv. 34. 5. Mod. 272. 7. Mod. 129. 3. Mod. 259.

(a) This was an issue directed out of the court of chancery to try whether, by the custom of *Diotsch*, hats-pies could be sunk in any part of the town, or in a certain place only, S. C. Salk. 281.

when

when it cannot otherwise well be proved ; and * therefore in the case of *Neal v. Jay* (a), a deed was produced dated in the first year of the reign of *Philip and Mary*, and Chronicles were admitted to prove that *King Philip* did not use the stile which was in the deed at that time : so in *Robert Henly's Case* (b), to prove the course of the Court the *Year-Books* were read in evidence ; *heralds books* have been allowed evidence in pedigrees (c) ; and *register books* of parishes in christenings and marriages (d), though no law for it ; for the nature of the thing requires it.

STAYNER
against
BURGESS OF
DIETWICH.

(a) See also *Lord Broucker v. Sir Robert Atkins*, where *Speed's Chronicle* was given in evidence to prove the death of *Isabel*, queen-dowager to *Edward the Second*. *Skin. 15. S. C. 1. Vent. 149.*
(b)

(c) *Thanet v. Foster*, 2. Jones, 224. *Bull. N. P. 248. Pilton v. Walter*, 1. *Stra. 102.*
(d) See *May v. May*, 2. *Stra. 1073. Gubb. Evid. 3d edit. 76. Bull. N. P. 247.*

Stedman against Page.

Case 153.

REPLEVIN BY TWO COPARCENERS ; one avows for the moiety of the rent,

Coparceners must join in a vowry.

PER CURIAM. Coparceners are but one tenant to a *præcipe*, they must join in one action of trespass ; and so in a *mortdancesfor*, where only the right is concerned ; and therefore much more in replevin, which goes to the right and to the possession.

S. C. Salk. 390. S. C. Comb. 347. S. C. 5. Mod. 141. S. C. 1. Ld. Ray. 64. Carth. 364.

Judgment was given for the plaintiff.

1. *Salk. 187. 1. Bac. Abr. 444. Cowp. 219. 2. Bl. Com. 188.*

Stayner against Baker.

Case 154.

A BILL imports it being under hand and seal, and not a note in writing only. A promise cannot be extinguished by a bill under hand alone, because in law it is of no higher nature. A bond is no satisfaction of money due, though it may be of money before it is due.

Promise cannot be extinguished by bill under hand alone. *Postea. Trin. 12. Will. 3. The*

King v. Woolston. Trin. 13. Will. 3. May v. King. Bond no satisfaction for money due.

Smith against Sharp.

Case 155.

PER CURIAM. There is a difference between doing a thing by a man and his assigns, and to them. If a thing be to be done by a man and his assigns, you must there alledge in the disjunctive, that it was neither done by him nor his assigns : but if a thing be to be done to a man and his assigns, you need not mention his assigns ; for if he has assigned it over, it must be shewed of the other side.

Difference between doing a thing by a man and his assigns, and to a man and his assigns. *S. C. 5. Mod. 133.*

S. C. Salk. 139. 1. Mod. 67. 8. Mod. 238. 1. Stra. 199. 1. Bac. Abr. 547.

Holford

Case 156.

* Holford *against* Lawrence.

Judge of Nisi Prius may by consent make a rule to refer, and oblige the parties to stand by it; so cannot as in this case, to be finally determined by him. **A** JUDGE OF NISI PRIUS may, by consent of parties, make a rule to refer, and then oblige them to stand to the determination; yet the sessions cannot so do, though it be by consent; yet we must allow them such a power. They may indeed refer a thing to another to examine, and make a report to them thereof, but not, as in this case, to be finally determined by him. Justices, but must be as their own order.

Case 157.

Anonymous.

Postea, Trin. 8. Will. 3. Phillips v. Crab. **PER CURIAM.** The second *scire facias* shall not be taken out before the first be returnable.

HILARY TERM,

The Seventh of William the Third,

I N

The King's Bench.

Sir John Holt, *Knt. Chief Justice.*

Sir William Gregory, *Knt.*

Sir Thomas Rokeby, *Knt.*

Sir Samuel Eyre, *Knt.*

} *Justices.*

Sir Thomas Trevor, *Knt. Attorney General.*

John Hawles, *Esq. Solicitor General.*

Fletcher *against* Ingram.

Case 158.

REPLEVIN. The defendant justifies as bailiff to Sir R. G. *Quere*, Whether that the place WHERE is within the manor of D. and that the lord of a leet they have by prescription A COURT-LEET there; that they can distrain for have a custom, that the jury shall chuse a constable, and impose a pe- an amercement nalty upon him of forty shillings if he refuse; that the plaintiff was without a spe- cial custom so elected at a court-leet, under the penalty, *et inde notitiam habuit*, but to do. did not execute the office; whereby he incurred the penalty of * [88] forty shillings, of which there was a presentment the next * court; but he totally omitted to pay it, and therefore the defen- s. C. 5. Mod: dant distrained. The plaintiff demurred. 127.

175. S. C. Comb. 350. S. C. Holt, 187. S. C. Skin. 635. S. C. Lilly, 369. S. C. 1. Salk. S. C. 1. Ld. Ray. 69. S. C. Ray. Ent. 117. 1. Salk. 175. 380. 2. Co. 38. 4. Com. Dig. 696. 1. Bac. Abr. 439. 3. Hawk. P. C. ch. 10. f. 32.

And *per* HOLT, *Chief Justice*, A constable belongs to every Steward cannot leet of common right; but whether of common right the steward fine a person for or jury ought to chuse him has been controverted: but suppose not executing of common right the steward ought, and by custom the homage do, the office of con- stable, unless he if the person thus elected do refuse in court, the steward may impose refuse in open court, but it must be presented by the homage at the next leet, and be amerced, and that amercement affected.—Sir T. Jones, 212.

a fine

Hilary Term, 7. Will. 3. In B. R.

FLETCHER
against
INGRAM.

a fine upon him. Indeed, if he be not present the steward cannot fine him, because the omission or refusal is out of court; and therefore he is to be presented to the homage at the next leet, and to be amerced, and the amercement to be affixed; which fines and amercements, being by common right, may be levied by distress. Now here is a customary penalty contrary to common right; you tax the penalty before the refusal; and so this being not of common right, you could not have distrained without alledging a particular custom for so doing. Then as to the notice, "*notitiam habuit*" is too general; you should have pleaded, that he was summoned within a convenient time to take the oath before a justice of peace, which is the course usually taken; for the steward, after the adjournment of the court, has no authority; and though before the statute of 13. & 14. *Car.* 2. the justices of peace could not make constables, yet swear them they could. But if it be objected, that justices of peace could not swear them, for they are within memory of man, and leets have been by custom *temps dont*, &c.; I answer, though as to the form of their commission and authority they are of late, yet they have the same power as conservators of the peace at common law had. All the conservators power is vested in the justices, and in that quality they shall be intended to swear constables.

Notice, *notitiam habuit* is too general.

Vide Holt's opinion, ante, 29.

ROKEBY, Justice. The defendant has failed in not alledging before whom the oath ought to have been taken, and has not alledged a custom for the distress.

Judgment was given for the plaintiff.

Case 159.

Anonymous.

DARNELL moved to quash an indictment for want of "*adjunct et ibid. impanellat.*" It has been often adjudged, that the want of "*onerat.*" is bad.

THE COURT. Let it be quashed *nisi*, for "*returnat.*" will not supply it.

* [89]

Case 160.

* The King *against* The Parish of Wootton Rivers.

In an order of removal, it is not necessary to say the person rented a house of ten pounds *per annum.*

Order must be on complaint of the churchwardens and overseers.

Jeers.—S. C. Holt, 520. S. C. Salk. 492. S. C. Carth. 365. S. C. 3. Salk. 254. S. C. Setp. & Rem. 18. 165. S. C. Foley, 72.

HOLT, Chief Justice, delivered the opinion of the Court, that the order is good, though it is not said that he rented a house of ten pounds a-year, according to 13. & 14. *Car.* 2. c. 12. for it has been the constant practice never to express it (a).

But this order is bad, because it is only said to be "on complaint" generally, and not "on complaint of the overseers and churchwardens." This spoils the order, for no man can disturb another coming into a parish except he have authority so to do (b);

(a) *Rex v. South Marston*, Stra. 189. But see *Rex v. Forrest*, 3. Term Rep. 38.
(b) *Rex v. Harely*, Andr. 361.— 38.

A complaint

Hilary Term, 7. Will. 3. In B. R.

A complaint *ex officio* to the justices is nothing. It may be the parish is willing to keep the party; and if so, the justices cannot remove him on complaint: and though the justices have returned on the *certiorari*, that this order was made "on the complaint of the churchwardens," that will not help it, because it is but a bare suggestion, though returned on record.

THE KING
against
THE PARISH
OF WOOTTON
RIVERS.

Chamberlain against Huetson.

Case 161.

THERE was a libel *ex officio* against Chamberlain for incontinency, at the promotion of Mrs. Huetson, who is alledged to be with her husband: whereupon there is a sentence given, penance enjoined, and, according to the course of the court, costs awarded to Huetson, who is not divorced *à mensâ et thoro* from her husband. The husband releases the costs to Chamberlain. She pleads this in the ecclesiastical court; and the plea being refused, she prayed a prohibition.

A husband may release costs awarded to his wife, in the spiritual court, if there be no divorce; if there be, he cannot, because supposed to arise out of her alimony; but he may release a legacy, though after divorce.

HOLT, Chief Justice. Now I take this difference: If a *feme covert* sue for defamation in the spiritual court, and obtain sentence, and costs are given her, if she cohabit with her husband at that time he may release them; but if she be divorced *à mensâ et thoro*, though the marriage still continue, he cannot, because if there is a divorce, the husband is to allow the wife alimony; and if she has alimony, the costs expended in the suit are supposed to issue out of it, and therefore the husband cannot release it, because she has it separate; which is the reason, though not mentioned, of *Metam's Case*, 2. Roll. Abr. 301. But if such *feme covert*, after such a divorce, sue for a legacy, which legacy if she recover comes to her husband, there the husband may release, 2. Roll. Abr. 303. because there is no alimony; and if he may release the duty, he may release the costs: therefore in this case he may release the costs, there being no divorce. I think a prohibition must be granted.

S. C. 1. Salk. 115.
S. C. Holt, 99.
S. C. 1. Ld. Ray. 73.
S. C. 5. Mod. 70.
2. Com. Dig. "Baron and Feme" (O.).
1. Bac. Abr. 211. 290.
3. Bac. Abr. 485.
4. Bac. Abr. 262.
Hull. on Costs, 599.

But ROKEBY, Justice, on account of the scandalousness of the cause, was against it. And afterwards a proposal was made for bringing the money into court, for Mrs. Huetson to take out as she had occasion to carry on the charges of the prohibition, and then to declare: *sed materia dormivit*.

* [90]

Culliford against Cordonmy.

Case 162.

IF A DEPUTY give a bond to account for the profits he receives, and to pay his master half of them, that is not within the statute of 5. Edw. 6. c. 16. for it is reasonable that the deputy should be paid for his pains. If it had been for a sum in gross, or the payment, 6. is good, not being for a sum certain.—S. C. Comb. 356. S. C. Salk. 466. S. C. Comy. Rep. 2. 3. Bac. Abr. 732. 5. Com. Dig. "Officer" (K. 1.).

Bond for deputy to have half the profits of an office which is within the 5. S. C. Holt, 506.

ment

Hilary Term, 7. Will. 3. In B.R..

CULLIFORD **against** **CORDONMY.** ment of an annual sum not issuing out of the profits of his office, it had been ill; but this well enough.

Judgment for the plaintiff (a).

(a) See *Blankard v. Cady*, 4. Mod. 215. and 4. Burr. 2494.

Case 163.

Burman against Sheppherd.

In trover for a bill of exchange, money not allowed to be brought into court. **IN TROVER** for a bill of exchange for one hundred pounds, *ad damnum* of one hundred and fifty pounds, a motion was made, that upon bringing fifty pounds into court it might be struck out of the declaration.

HOLT, Chief Justice. This practice in *assumpsit* has been brought in within few years, and has been only allowed because payment goes to the issue; but in *trover* it goes only to the damages. It may be, the plaintiff has good cause of action for part, and a probable cause for the residue; now it would be hard to strike out his certain cause, and put him to try his probable cause at the peril of costs (a).
S.C. Comb. 357. *Postea*, Trin. 8. Will. 3. *Pawlet v. Heatfield*. Paich. 10. Will. 3. *Smith v. Johnson*. Mich. 10. Will. 3. *Lawley v. Dibble*. Paich. 12. Will. 3. *Fanell's Case*.

(a) In what cases money may be brought into court, see *Tidd's Practice*, 469 to 472.

EASTER

E A S T E R T E R M,

The Eighth of William the Third,

I N

The King's Bench.

Sir John Holt, Knt. Chief Justice.

Sir Thomas Rokeby, Knt.

Sir John Turton, Knt.

Sir Samuel Eyre, Knt.

} *Justices.*

Sir Thomas Trevor, Knt. Attorney General.

John Hawles, Esq. Solicitor General.

* [91]

* *Armitage against Row.*

Case 164.

A MOTION was made, that the plaintiff may file his original, and enter up the issue on record, for he has since arrested the defendant three times for the same cause of action : and the defendant doubted whether he might plead in bar another action pending, with a *prout patet per record*. before it was entered.

It may be pleaded in bar, that another action is pending for the same cause, *prout patet per recordum*, before the issue is entered.

PER CURIAM. He may : if they do not enter it, you may, without any motion in court, give a rule to enter it.

HOLT, Chief Justice. The altering the antient method of the common pleas, as to the imparlance roll and the plea roll, has caused great confusion. Formerly, a declaration was entered on the roll the same day wherein the writ was returnable, with an imparlance over to the next Term, which was called **THE IMPARLANCE ROLL**, and then the next Term they entered their declaration over again, with an *alias prout patet* on another roll, which they called **THE PLEA ROLL** : but now the prothonotaries have thought fit to alter the course, making the plea roll an original roll of the subsequent Term, without an *alias prout patet*, or any relation to the precedent Term, except in the case of privilege and *scire facias*, where they now enter an *alias prout patet*.

There was

Easter Term, 8. Will 3. In B. R.

ARMITAGE *against Row.* was a case sometime ago by writ of error in this court, which was settled after great argument, *viz. Moyle v. Hawkey*, wherein there was entry, with a continuance to the subsequent Term, but no entry in the subsequent Term, with an *alias prout patet*, or any relation to the precedent Term, and yet we affirmed the judgment, because of the new practice now introduced.

• [92]

Cafe 165.

* Robert *Qui Tam* against Witherhead.

DETINUE on the statute 12. Car. 2. c. 18. of Navigation, for thirty-six barrels of oil of six hundred and thirty-nine pounds as forfeiture, for importing goods in a vessel not belonging to England, nor being navigated by the master and mariner, three parts whereof were *English, &c.*

If a statute, viz the Navigation Act, 12. Car. 2. ordain, that no good, shall be imported but in English-built ships, &c. "under the penalty and forfeiture of ship and goods, one moiety to the king, the other to him that shall inform, seize, or sue for the same, without saying by what mode of seizure, the lord could replevy them (a): and yet a replevin proceeding, an action of detinue will lie before seizure for ship and goods so forfeited: for the property is divested out of the owner by the forfeiture, and vested, by commencing the action, in the person who sues. S. C. 1 Salk. 213. S. C. Comb. 361. S. C. 5. Mod. 193. 11. Co. 89. Hard. 353. a. Bac. Abr. 47. Vide 1. Inst. 46. b.

The question was, Whether *detinue* lay on this statute?

And **PER TOTAM CURIAM**, Judgment for the plaintiff.

HOLT, Chief Justice. The design of this act was to make an immediate alteration of the property of the goods; the one moiety to the king, the other to him who would inform and sue for the same. If he had seized the goods, or any part in the name of the whole, no one will doubt but *detinue* would have laid. At common law, a villein had absolute property, and the lord had it not till seizure made. If a villein before such seizure had aliened, the lord could not touch them; but if they were distrained before seizure, the lord could replevy them (a): and yet a replevin supposes an antecedent right as much as a *detinue*; and the reason is, because the bringing a replevin amounts to a claim and seizure, and *eo instante* vests the property in the lord. In debt upon a bond, where the contract is to pay the money on request, the party brings his action without any request, yet the bringing the action is one; so here, the bringing a *detinue* amounts to a seizure.

ROKESBY, Justice. The property is divested out of the owner by importation, but not vested in him that sues until bringing the action or seizure (b).

(a) Co. Lit. 145. b.

(b) In Hilary Term, 33. Geo. 3. it was adjudged, on the authority of the above case, that if a ship be seized as forfeited under the Navigation Act, 12. Car. 2. c. 18. by a governor in a foreign country belonging to Great Bri-

tain, the owner cannot maintain *rescissio* against the party who seized the ship, although he do not proceed to condemnation; for the property is divested out of the owner by the forfeiture. *Wilkins and Others v. Despard*, 5. Term Rep. 112.

Hoard *against* Tenison.

Cafe 166.

ACTION UPON THE CASE for six several promises, all of them laid the twenty-first of *October*. The defendant pleaded *infra etatem* generally. The plaintiff replied specially as to two of the promises *præcludi non debet*, because the defendant was of full age at the time of making them; and *quoad placitum* as to the rest, it was *pro necessario vestitu* according to his degree.

In case, the precise day is not material; and if you force the plaintiff to vary from it, it is no departure.

The defendant demurred, because the replication was repugnant in itself, it being impossible that a man should and should not be of age on the same day.

Postea, Mich. 8. Will. 3. Blackhall v. Eccles. Mich. 8. Will. 3. Wall v. Duke, Comb. 361.

PER CURIAM. The day is but circumstance and not material, and no part of the issue; a man is not bound precisely to the day in his declaration; and if you force him to vary from it, it is no departure.

Judgment for the plaintiff.

* [93]

* Thwaits *against* Lady Ashfield.

Cafe 167.

IN DEBT FOR RENT the plaintiff declared, that certain houses in *London* were burnt down by the general fire, and recited the acts for rebuilding the city; and that by virtue of those acts, at a court of judicature at *Clifford's Inn*, a lease was decreed to be made to the defendant of the premises for fifty-one years, under the yearly rent of fifty-three shillings and fourpence; and avers, that for nineteen years rent for the premises, ending at *Michaelmas* last, there was due to him fifty-eight pounds thirteen shillings and fourpence; *per quod actio accrevit*.

If a plaintiff demand by his declaration more rent than is due, he may, on releasing of the overplus, have judgment for the residue.

S. C. Comb. 365. S. C. 5. Mod. 312.

The defendant pleaded *nul tiel record* of the decree mentioned in the declaration.

The plaintiff prayed a *certiorari* to the mayor and aldermen of *London* to bring in the record; and so it was.

IT WAS MOVED in *arrest of judgment*, that the plaintiff demanded more rent than appears, by his own shewing, to be due; and though the plaintiff has entered a release on the record of the overplus, yet this will not help it, the demand being entire.

NORTHLEY contra argued, that the eight pounds being released, the plaintiff might take his judgment for what was due; and this is warranted by all authorities. So in an *assumpsit* on several promises, if the declaration as to some be well, and as to others ill, the plaintiff may take judgment for what is well; and there is no difference between *debt* and *assumpsit*, for the demand is entire in both. So is *Hob. 178. Stil. 175. and 1. Roll. Abr. 785; Barber v. Pomroy*, which is a case in point; and argued further *prout*. 1. Saund. 285, 286.

1. Vent. 49. 1. Roll. Rep. 335. 1. Bullst. 155. Vide 2. Lev. 4.

VOL. XII.

H

But

Easter Term, 8. Will. 3. In B. R.

THWAITES
against
LADY
ASHFIELD.

But SELBY said, this was entire, and that in *Hobart* they were several; and the demand *quod reddat ei* the whole sum due on all bonds.

HOLT, *Chief Justice*. The *placitum* in that case was entire, and demand *quod reddat ei* the whole sum due on all bonds; and if one appear not to be due, he shall recover for all the rest. By the same reason, if debt be for a hundred pounds, and it appears that there is but ninety pounds due, upon release of the odd ten pounds he shall have judgment for ninety pounds; and in this case, if they had gone to trial, and the jury had found that but fifty pounds thirteen shillings and fourpence had been due, it had been good. The case of *Barber v. Pomroy* is good law.

Judgment for the plaintiff.

But PER ME, If demand be of less than is due, it will be fatal.
1. Cro. 137. 104.

Case 168.

Anonymous.

S. P. post. 128.
Doug. 437.
Stra. 479.
1. Term Rep.
363.

AFTER A TRIAL AT BAR no new trial ever granted purely because the jury went against evidence, except at the end of the last reign, which was irregular (a).

(a) See *Bright v. Eynon*, 1. Burr. 35. and *Stra. 584.* 2. *Ld. Ray. 1358.* grant a new trial after a trial at bar, when the justice of the case demands it.
3. *Peet. Wms. 212.* that the Court will

TRINITY TERM,

The Eighth of William the Third,

IN

The King's Bench.

Sir John Holt, Knt. Chief Justice.

Sir Thomas Rokeby, Knt.

Sir John Turton, Knt.

Sir Samuel Eyre, Knt.

} *Justices.*

Sir Thomas Trevor, Knt. Attorney General.

John Hawles, Esq. Solicitor General,

* [94]

* Philips *against* Crab.

Case 169.

WHEN the attornies on both sides are to attend the striking a jury on a trial a jury on A TRIAL AT BAR, if one will not attend on at bar may be due notice, the jury shall be struck *ex parte*, and the struck *ex parte* secondary shall strike twelve for him that does not attend,

Anonymous,

Case 170.

PER CURIAM, Two *scire facias* shall not be taken out both together; for the future, the second shall not be taken out till the day of the return of the first. *Scire facias.* Ante, 87.

In the common pleas they have but one *scire facias*, but then there must be fifteen days between the *teste* and the return of the writ, and that returnable too on a common day; but each writ is returnable here in eight days, on a day certain; so that less time is here necessary for both than in the common pleas for one.

Trinity Term, 8. Will. 3. In B. R.

Case 171.

The King *against* Giles.

A return of res- **M**OTION to quash a rescous returned against *Giles*, because
cue out of the said to be *ex custodia ballivorum*, whereas it should be *ex custo-*
hands of *bailiffs*, *diā vicecom.*; for the custody of bailiffs is the custody of sheriffs.
is good

Sir T. Jo. 197. PER CURIAM. Both ways are good; and so it has been fre-
* [95] quently adjudged.

Case 172.

* Pawlett *against* Heatfield.

Money not al- **I**N AN ACTION OF COVENANT on three distinct covenants several
lowed to be breaches were assigned; one was for non-payment of rent.
brought into

court on cove- A motion was made, that upon bringing ten pounds into court
nant for pay- it might be struck out of the declaration.
ment of rent.

Ante, 90.

But THE COURT denied it; for when it appears that the plaintiff
Postea. Pasch. has just cause of action for one thing, they will not put him to try
20. Will. 3. the rest at the peril of costs (a).
Smith v. John-

son. Mich. 10. Will. 3. Lawley v. Dibble. Pasch. 12. Will. 3. Farrell's Case.

(a) See *Gregg's Case*, 2. Salk. 596. Anon-
ymous, 1. Will. 75. and the case of *Hallett*
v. The East India Company, 2. Burr.
1120.; in which last case LORD MANS-
FIELD says, "In motions of this kind the
" true and sensible distinction is, that
" wherethe sum demanded is a *sum certān*,
" or capable of being ascertained by mere
" computation, without leaving any other

" sort of discretion to be exercised by the
" jury, it is right and reasonable to admit
" the defendant to pay the money into
" court, and have so much of the plain-
" tiff's demand upon him struck out of
" the declaration, and that if the plaintiff
" will not accept it he shall proceed at
" his peril." See also 4. Term Rep.
579.

Case 173.

The King *against* Walcot.

Attainder of **E**RROR to reverse an attainder of *Walcot* for compassing the
treason reversed death of the king.
for want of *ipse*

vivente, or in The error insisted on was, the omission of "*ipse vivente*" or
conspēctū ejus, as "in *conspēctū ejus*" in that part of the judgment which was *interiora*
to the *interiora*. *sua extra ventrem suum capiantur et in ignem ponantur*.

S. C. 2. Salk. 632.

S. C. 4. Mod. 395.

S. C. Comb. 369.

S. C. Cart. 118.

S. C. Show. P. C.

127.

S. C. Holt. 640.

S. C. 3. Str. Tr.

600.

S. C. 6. St. Tr.

App. 62.

Vide Dalt.

c. 141.

THE COURT gave their opinion *seriatim* that the judgment is
erroneous.

BYRE, *J. f. fice*. There are multitudes of precedents where
ipse vivente is mentioned: In *Humphrey Stafford's Case* (a), men-
tioned by Bro. "Czr." 128. there are some omissions in that judg-
ment as reported, but on the roll it is full in every particular. So
as *Ed. Bohun's Case* (b). So is *John Bemg's Case* (c). So is that
of *Rob. Dudley* (d). The same in *Stamford's Pleas of the*
Crown (e). So *J. Littleton's Case* (f); and my Lord *Stafford's*
Case (g), by the advice of all the Judges. It is objected, that

(a) 1. Hen. 7. pl. 24.

(b) 13. Hen. 8. Stow. Chron. 513.

(c) 3. Edw. 6. Co. Ent. 699.

(d) 2. Alury, Plowd. 387. Rastal,

845.

(e) S. P. C. 182. a.

(f) 43. Eliz. Co. Ent 422. 3. Inst.

210.

(g)

vivens

Trinity Term, 8. Will. 3. In B. R.

vivens prosterneatur is enough ; but to that it may be answered, both one and the other are in the precedents. It is objected, that there are some precedents without it, as that of *David Prince of Wales* (a) ; but that was a judgment in parliament ; and if we look into *Cotton's Records*, they increased or lessened the punishment, in all the judgments in parliament, according to the greatness or heinousness of the offence. Besides, all attainders before the twenty-ninth year of *Queen Elizabeth* are not to be regarded, there being an act of parliament on purpose to confirm them.

THE KING
against
WALCOT.

ROKEBY, *Justice, acc.* That it is not in the power of the Judges to add to or diminish any part of the punishment, by making it severer or milder ; * and if this judgment should be affirmed with this omission, we must say in effect, that all those judgments wherein this is erroneous, and by consequence must be reversed.

* [96]

HOLT, *Chief Justice, acc.* Though the omission of this part of the judgment be for the benefit of the party attainted, yet still it is error, it being a necessary part of the judgment ; and this is agreeable with the rules of law in other cases : as in debt on bond, the plaintiff declares to his damage, and judgment given that the plaintiff should recover his debt, but no notice taken of the damages ; though this omission be for the advantage of the defendant, he may assign it for error, because it is a necessary part of the judgment. I am confirmed by the vast number of precedents in all kings reigns, except some old obsolete ones and a few in *King Charles the Second's* time, which were of no great consequence ; and if this be not good, all the judgments that have these words must be reversed ; for then those judgments are more severe than the law allows. And if they are good, this is less severe ; and judgment in all capital cases is stated and settled by the common law, which no court can alter.

Vol. 107.
8. Co. Beecher's
Case.

Postea, Mich.
11. Will. 3.
Dillon v. Wal-
cot.
Sho. Par. Ca.
127.

Wherefore the attainder was reversed.

This judgment of reversal was affirmed in parliament.

(a) Fleta, lib. 1. 16. 2. Inst. 195.

Anonymous.

Case 174.

THE QUESTION in this case was, Whether one jointenant may not only distrain, but also avow, in his own right, without making any consuance also as bailiff to the other jointenant ; and the case of *Bowles v. Poor* (a) was objected, where a husband distrained for rent due to the wife in his own right only, and adjudged good.

One jointenant may distrain for the whole rent ; but when he avows, it must be for part in his own right, and make consuance as bailiff for the rest.

But that was because the right of the rent was in the husband only ; but here it is otherwise.

THE COURT. One jointenant may distrain for the whole ; but when he avows, it must be for part in his own right, and make consuance, as bailiff to his companion, for the rest ; and when judgment is given for a return, it must be according to the right of both.

Ante, 77.

(a) 1. Bull. 135. Cro. Jac. 182.

Trinity Term, 8. Will. 3. In B. R.

Bailiff, or not,
traversable in
replevin.

* [97]
Case 175.

Bill accepted for
money won at
play shall not be
recovered a-
gainst the ac-
ceptor, even by
an innocent in-
dorsee for a va-
luable consid-
eration.

S. C. 5. Mod.
175.
S. C. Salk. 344.
S. C. Carth. 356.
S. C. Holt, 328.
S. C. Com. Rep.
4.
6. C. 1. Ld. Ray.
87.
S. C. Ray. Ent.
136.
4. Com. D'g.
" Justices of
" Peace"
(B. 42).
4. Bac. Abr. 65.
2. Term Rep.
439.

NOTE, In the case of *Trevilian v. Pine* (a) it was adjudged, that bailiff or not was traversable in replevin.

(a) In the common pleas, in Easter Term, 6. Anne.

Huffey against Jacob.

ACTION ON THE CASE on a bill of exchange, setting forth the custom of merchants; and that if any merchant shall draw a bill directed to another, and he to whom it is * directed accepts it, that he becomes chargeable therewith; that *Lord Chandos*, using commerce according to the said custom, did make and direct a bill to *A. Jacob* the defendant, who accepted it, and by virtue thereof he became chargeable.

The defendant pleaded the statute of Gaming, 16. Car. 2. c. 7. that *Lord Chandos* and the plaintiff played together at *hazard*, and that at that playing *Lord Chandos* lost to the plaintiff above one hundred pounds at one sitting; that for this money so lost he gave this bill, which by force of the said act is void.

The plaintiff demurred, and shewed for cause, that the plea amounted to the general issue (a).

And PER CURIAM,

FIRST, In all causes where a man admits the action, were it not for special matter, that matter may be specially pleaded; though it may likewise be given in evidence on the general issue (b).

SECONDLY, That in this case the acceptor may well plead the statute 16. Car. 2. c. 7. in bar; for though the acceptance makes a new contract, yet it stands on the former consideration; and if this plea should not be good, the statute would be eluded. Indeed, if the plaintiff had indorfed the bill over *bona fide* to another, who was ignorant of the iniquity, the statute could not have been pleaded against such an indorsee (c): but surely it may against him who is party to the wrong.

Judgment was given for the defendant.

(a) See *Hedges v. Sandon*, 2. Term Rep. 439.

(b) See *James v. Fowkes*, post. 101. *Hallet v. Birt*, post. 120. *Harrison v. Cage*, post. 214. *Paramour v. Johnston*, post. 376.

(c) But now by 9. Anne, c. 14. l. 2. " All notes, bills, bonds, judgments, " mortgages, or other securities or con- " veyances whatsoever, given, granted, " drawn, or entered into, or executed " by any person, for money or other " valuable thing won by gaming, or by " betting on such as do game, or for re- " imbursement or repaying any money " knowingly lent or advanced for gaming " or betting, or lent or advanced at the " time and place of play to any person " gaming or betting, are void." And it has been decided, that an indorsee of a promissory note given for money know- ingly advanced by the payee to the drawer to game with, is not recoverable against

the drawer, although the indorsee paid a full and valuable consideration for it to the payee, and was not privy to or had any notice that the money was lent to game with, *Bowyer v. Dampton*, 2. Stra. 1156. — See also *Lowe v. Waller*, Dougl. 741. But this statute only renders such securities as are therein mentioned void, and does not destroy the validity of a contract for money lent to play with; and therefore money so lent is recoverable in an action of *assumpsit*, if no security was taken for it, *Barbeau v. Walmfley*, 2. Stra. 1248.; and it has been held, that such contract is divisible, and that if A. win 372l. and afterwards lend 300l. to the loser, and take a note for the whole 672l. yet, though the note is void as being a security, he may recover the 300l. which was lent, *Robinson v. Bland*, 2. Burr. 1081. S. C. 1. Bl. Rep. 234. — See also *Alcinbroke v. Hall*, 2. Will. 309. *Jefferies v. Walter*, 1. Will. 220.

ERROR OF A JUDGMENT in the court of common pleas in an action on the case, where the plaintiff declared, that he was lawfully possessed of a tenement, and that he ought to have common of pasture in one thousand acres, in a place called, &c. for all commonable beasts *levant et couchant* on the tenement aforesaid; that the defendant made coneyburrows, whereby the plaintiff could not enjoy his common *in tam amplo et beneficiali modo*. The defendant demurred:

HOLT, *Chief Justice*, delivered the opinion of the Court, that judgment ought to be affirmed; and that the declaration was good, without setting out a title to the common, either by grant or prescription.

FIRST, Because the action is brought upon the possession, and is founded upon a wrong done upon the possession, and not to the title.

SECONDLY, It is not necessary that it appear whether the defendant be owner of the land or not, and therefore no need of setting forth a title. But if it had appeared by pleading, that the defendant is owner of the land, there it is necessary to set out a title; but here it stands * indifferent whether he be owner or a stranger; but when it comes on special pleading, as in trespass for taking and chasing his cattle, if the defendant justifies as in his freehold, and that he took them damage-feasant, there the plaintiff must shew forth some title in his replication, in answer to that of the defendant's in his bar. But in a declaration, where the defendant may be as well supposed a stranger as an owner, there no title is necessary to be shewn.

THIRDLY, This matter is not traversable, for all the right of the common must be given in evidence upon not guilty, or else the plaintiff cannot recover; and if so, it is to no purpose to set it forth in the declaration; and he said, the case principally to be relied on is that of *St. John v. Moody*, in HALE's time (a), where the plaintiff declared, in an action on the case, that he was seised of twenty acres of wood, and used to have a way over such a place to that wood, and was disturbed in it by the defendant; he said, it was true the plaintiff declared on a seisin in fee, but that was not necessary, for a seisin in fee is not necessary to be set forth but where a prescription is to be made; and therefore a declaration on the possession, where no prescription is made, is as good as upon a seisin in fee: the exception to the declaration in that case was taken after verdict; but the whole Court were of opinion, that though there had been no verdict, yet the declaration had been good; and there are several precedents since of this kind.

And the judgment was affirmed.

(a) Mich. Term, 27. Car. 2. 1. Vent. 274. 356.

In an action for disturbance of common, it is not necessary for the plaintiff to shew title to the common; it is sufficient to state that he was possessed of a tenement, &c. and had right of common in the place where, &c.

* [98]

- S. C. 4. Mod. 418.
- S. C. Skin. 621.
- S. C. 3. Salk. 12.
- S. C. Comb. 320.
- 3. Lev. 104.
- Cap. material.)
- Vide 1. Cro. 138. 575.
- 2. Cro. 42.
- 3. Cro. 419.
- 1. Vent. 274.
- 319.
- Str. 1238.
- 4. Bac. Abr. 152.
- 5. Com. Dig. "Pleader"
- (C. 39.).
- 1. Burr. 440.
- Bull. N. P. 76.
- 3. Term Rep. 147. 767.
- 4. Term Rep. 719.
- 5. Term Rep. 46.

Trinity Term, 8. Will. 3. In B. R.

Cafe 177.

The King *against* Granfield.

To say, "the
" mayor and al-
" dermen of H.
" are a pack of
" as great
" rogues as a-
" ny that rob
" on the high-
" way," is not
indictable.

GRANFIELD was found guilty, at the sessions of *Hertford*, on an indictment for saying, "The mayor and aldermen of *Hertford* are a pack of as great villains as any that rob on the highway."

And having slipt the time of moving in arrest of judgment, they moved to submit to a small fine (a).

PER CURIAM. We are not satisfied that the words are such as he may be indicted for; for what is it to the Government, that the mayor, &c. are a pack of rogues (b) ?

S. C. 5. Mod.
203.

So they fined them sixpence a-piece.
Hob. 202. Moor, 819. 1. Mod. 35. 2. Vent. 16. 2. Salk. 693. 6. Mod. 124. 2. Term Rep. 199.

(a) A motion in arrest of judgment on an indictment may be made at any time before judgment is actually pronounced.
(b) See *Rex v. Burford*, 1. Vent. 16. Anonymous, 1. Vent. 10. *Wrightson's Cafe*, 2. Salk. 693. *Reg. v. Soley*, 3. Salk. 698. *Reg. v. Langley*, 6. Mod. 124. *Rex v. Legarley*, 1. Hawk. P. C. ch. 21. f. 13. *Rex v. Barker*, 1. Mod. 35. *Rex v. Revelle*, 1. Stra. 420. *Rex v. Pocock*, 2. Stra. 1157. *Rex v. Darby*, 3. Mod. 139.

* [99]

Cafe 178.

* The King *against* Bracy and Others.

Indictment for a riot *contra formam statuti* is good.

INDICTMENT FOR A RIOT. An exception was taken, that the conclusion ought not to have been *contra formam statuti*, it being an offence at common law.

S.C. Comb. 371.

PER CURIAM. Barratry was an offence at common law, yet it is good to conclude *contra formam diversorum stat.* Stabbing was an offence at common law, and therefore a man may be indicted generally, or specially, *contra formam stat.*; and even in an indictment on the statute, the jury find it manslaughter generally.

Therefore **THE COURT** refused to quash the indictment; but bid the Counsel demur, if he thought fit (a).

(a) If an indictment for an offence at common law conclude, "against the form of the statute, &c." these words may be rejected as surplusage, *Rex v. Bathurst*, Sayer, 225. *Rex v. Mathews*, 5. Term Rep. 162.—See also 4. Hawk. P. C. c. 25. f. 115.

Cafe 179.

Williams *against* Batter and Others.

Two actions brought against a person, and the same bail in both; a *redditis se* in one, a discharge of the bail in the other.

THE QUESTION was upon a point of practice, Whether a *redditis se* upon one action, where there were two actions against the same parties, where the same parties were bail, should be a discharge to the bail in the other action.

And **THE COURT** was of opinion, that it should discharge the bail in the other action too; and the plaintiff's attorney having notice of it, and after taking out execution against the bail, the execution was discharged; and ordered the attorney should pay such costs as the Master should tax.

Anonymous.

Trinity Term, 8. Will. 3. In B. R.

Anonymous.

Case 180.

NO MAN can change his attorney without leave of the Attorney Court.

Anonymous.

Case 181.

IN THIS COURT, *oyer* of a deed may be demanded after imparlance. *Oyer* after imparlance.

Anonymous.

Case 182.

HOLT, *Chief Justice*. Though a writ of error be a *superse-* Writ of error
deas in itself, yet after execution begun it shall not hinder it, shall not stop
but the sheriff may go on, and on a *fieri facias* sell the goods. execution be-
gun.

6 Mod. 130. 1. Salk. 321. 1. Burr. 340. 1. Term Rep. 280. 2. Str. 1186. 631. Tidd's Prae.
514. 716. 2. Term Rep. 45.

MICHAELMAS

MICHAELMAS TERM,

The Eighth of William the Third,

IN

The King's Bench.

Sir John Holt, *Knt. Chief Justice.*

Sir Thomas Rokeby, *Knt.*

Sir John Turton, *Knt.*

Sir Samuel Eyre, *Knt.*

} *Justices.*

Sir Thomas Trevor, *Knt. Attorney General.*

John Hawles, *Esq. Solicitor General.*

* [100]

Cafe 183.

* Truelock against Hartfield.

Administration **D**EBT ON A BOND as administrator. The plaintiff in his count pleaded to be says, that administration was committed to him "*per J. S. Official. Decani Sarum loci illius ordinari. legitimè constitut. cui Sarum, istius loci ordinari. cui ad-*" *administratio de jure pertinuit,*" without saying "*adiunt pertinuit ;*" he does not say, "*coment constitut. ;*" and held good notwithstanding. *ministratio de jure pertinuit,* without saying, *ad tunc, et quomodo constitut. good.*—S. C. Comy. Rep. 17. 1. Show. 355. Salk. 40. 2. Mod. 65. 4. Mod. 133. 6. Mod. 231. 1. Ld. Ray. 635.

Cafe 184.

Dixon against Willows.

Money.

HOLT, *Chief Justice.* Guineas are coined at the king's mint for twenty shillings, and at that rate are lawful money of England without any proclamation for their currency: the indentures between the king and master of the mint are sufficient. S. C. Salk. 446. 387. S. C. 3. Salk. 239. S. C. Holt, 471. Poph. 28. Cra. Car. 515. Palm. 407. 5. Mod. 6. 1. Salk. 9. 22.

Cafe 185.

Hicks against Dowling.

Cafe, for negligently keeping his fire, lies for **A**CTION UPON THE CASE for negligently keeping his fire, by a lessee against an under-lessee. S. C. 1. Salk. 13. S. C. 1. Ld. Ray. 99. S. C. 3. Ld. Ray. 236. 3. Lev. 359.

PER

Michaelmas Term, 8. Will. 3. In B. R.

PER CURIAM. It lies, because the lessee is answerable over to his lessor (a).

(a) See the case of *Jermey v. Lowgar*, v. *Isham*, 1. Salk. 19.; and 10. Ann., Cro. Eliz. 461. *Countess of Salop v. Crompton*, Cro. Eliz. 777. 784. Paulain

PER CURIAM
Hic
against
Dowling

* [101]

* Lee against Brace.

Case 186.

TRESPASS AND EJECTMENT. Special verdict, That *Walter Brace*, being seised in fee of the lands in question, did enfeof *J. S.* in fee, to the use of the feoffor for life; and after his decease, to the use of *T. Brace* his son, and his heirs for ever; and for want of issue of his body, to the right heir of the feoffor.

And THE QUESTION WAS, Whether *T. B.* had a fee or a tail?

And per *HOLT, Chief Justice*, The intention of the party is to pass only a tail; and that contradicts no rule of law; for the law requires the word "heirs" to make a fee-tail as well as a fee-simple; and the generality of those words may be qualified by subsequent ones; and the words "for default of such issue" shew what heirs he intended, as much as if he had said, "to one and his heirs, to wit, the heirs of his body."

Judgment that it is only an estate-tail.

S.C. 5. Mod. 266.
S.C. Carth. 343.
S. C. Ld. Ray.
101.
S.C. 3. Salk. 337.
S. C. Holt, 668.
S. C. Sayer, 68.
Plowd. 541.
Cro. Car. 265.
3. Lev. 70.
8. Mod. 23.
2. Salk. 734.
1. Peer. Wms.
199. 432. 563.
Cowp. 234. 410.

James against Fowks.

Case 187.

ASSUMPSIT AGAINST A WOMAN, who pleads coverture *tempore promissionum*. The plaintiff demurs, because it amounted to the general issue.

PER CURIAM. Where it is matter of law that amounts to the general issue, it may be pleaded, and is no cause of demurrer; for matter of law in that case is matter of fact, which avoids the action, and so may be pleaded or given in evidence as the defendant pleases (a).

(a) See *Huffey v. Jacob*, ante, 96. *Cage*, post. 214. *Paramour v. Johnston*, *Hallet v. Birt*, post. 120. *Harrison v.* post. 376.

Matter of law
which amounts
to the general is-
sue may be
pleaded or given
in evidence.
S. C. 1. Ld. Ray.
89. note.

Fuller against Smith.

Case 188.

ERROR from the court of common pleas in an action of trover against ten, wherein the plaintiff declares of a finding by ten, and a conversion by nine, and judgment against all ten.

PER CURIAM. The conversion is the gist of the action; for if a man find goods, it is lawful for him to take them; wherefore it must be certainly error. But if you get it amended in the common pleas, we will get it amended here.

Trover against
ten, declaring of
a conversion by
nine, and judg-
ment against
ten, is erroneous.

Blackhall

Case 189.

* Blackhall against Eccles.

If, in trespass for assault, a time be laid in the declaration which was after the verdict, it is cured by the verdict.

TRESPASS FOR ASSAULT AND BATTERY, and declares for a battery on the first day of February, in the eighth year of the now "king," which is not yet come.

And this was *MOVED in arrest of judgment.*

S. C. 2. Salk. 662.
S. C. 3. Salk. 8.
S. C. Carth. 389.
S. C. Com. Rep. 18.
S. C. 5. Mod. 286.
Yelv. 94.
3. Burr. 1729.
1. Bac. Abr. 192.
5. Bac. Abr. 314.
317. 5. Com. Dig. "Pleadin" (C. 19.). Bull. N. P. 86. Dougl. 681.

NORTHEY for the plaintiff acknowledged, that if the time in the declaration had been after the bill filed, and before the trial, the judgment must be arrested, because then it would have appeared that the jury gave damages for an action arising since the suit commenced; but in this case, the time being after the trial, it is as if there were no time at all, it being impossible, and therefore holpen after verdict. The case of *Sorrell v. Lewin* (a) is the same with this, where an *assumpsit* was laid of a time not come.

PER CURIAM. The day alledged is no day at all; the time is but a circumstance (b); and therefore

Judgment was given for the plaintiff.

(a) Mich. Term, 26. Car. 2.

(b) See *Hoard v. Tennison*, ante, 92. *Wall v. Dukes*, post. 105.

Case 190.

Duncomb against Church.

If it appear in pleading, that a privileged person is actually in custody, he cannot have it.

S. C. Salk. 2.
S. C. Comb. 350.
S. C. Holt, 588.
S. C. 1. Ld. Ray 93.
7. Mod. 105.

HOLT, Chief Justice. A privileged person in the common pleas may be in custody of the marshal; for he may either waive or misplead his privilege; and if he be actually in custody, and it appear so by pleading, he cannot have his privilege: and if one plead an exempt jurisdiction from all the courts of *Westminster*, and not to be sued but in such particular courts and franchises, there you must shew that they have a jurisdiction of the matter, and that the cause arises within their jurisdiction.

Postea, Hil. 8. Will. 3. Bands v. Bodiner; and Stones v. Bodiner.

Case 191.

Anonymous.

Impar lance.

SPECIAL IMPARLANCE should not be allowed without the leave of the Court, or consent of parties.

Case 192.

The King against Keat.

Bail not allowed in manslaughter till clergy had.

THE COURT refused to bail him, he being found guilty of manslaughter, for that they could not bail him until clergy had, according to *Buckler's Case* (a).

S. C. 5. Mod. 287. S. C. 1. Salk. 47. S. C. Comb. 406. S. C. Skin. 666. S. C. Holt, 481. S. C. 3. Salk. 191. 1. Salk. 103. 2. Vent. 93.

(a) Stilcs. 467.—See also *Armstrong v. Lisle*, post. 108.

Brent

* Brent *against* Sir Henry Edwin.

Case 193.

THE PLEA of "*non assumpsit infra sex annos*" is a special Pleading.
issue,

Oldham *against* Pickering.

Case 194.

ATTACHMENT UPON PROHIBITION. The case was: *Estate pur autre vie is only assets in respect of creditors, and not chargeable with legacies, unless therout expressly given; and the executor or administrator, if no debts, will be occupant, and not distributable.*
The. Oldham was seised of a messuage to him and his assigns for three lives; dies intestate without children, having only *Anne Pickering* his sister. Administration was committed to *Sarah Oldham* the plaintiff, whom the defendant sued in the spiritual court for distribution.

The single question was, Whether an estate *pur autre vie* be now distributable in the same manner as an intestate's goods and chattels, according to 22. Car. 2. c. . by force of 29. Car. 2. c. 3. whereby it is enacted, "That an estate *pur autre vie* shall be devisable; and if no such devise be thereof made, the estate shall be answerable in the hands of the heir, if it shall come to him by reason of a special occupancy; and in case there be no special occupant, it shall go to the executor or administrator of the parties that had the estate thereof by virtue of the grant, and shall be assets in their hands?"

And adjudged, *per* HOLT, Chief Justice, ROKEBY, TURFON, and EYRE, Justices, That the prohibition should stand, and that an estate *pur autre vie* of an intestate was not distributable; for notwithstanding this alteration by the statute, it remains a freehold still; and the amendment of the law in this particular was only designed for relief of creditors, that if it came to the heir by reason of special occupancy, it shall be in his hands as assets by descent, that is liable to those debts where the heir is chargeable, and those only; but if there was no special occupant, then it shall go to the executor and administrators, and they shall be in the room of the occupant, and it shall be assets in their hands for the payment of debts; but it is not assets to pay legacies, except such as are particularly devised out of it, the statute only having made it assets for a particular intent to pay creditors: so as no debts appearing in this case, the administrator is as it were the occupant, and shall not be compelled to make distribution (a).

(a) By 14. Geo. 2. c. 20. reciting 29. Car. 2. c. 3. and that doubts had arisen, where no devise has been made of estates *pur autre vie*, to whom the surplus of such estates, after the debts of such deceased owners thereof are fully satisfied, shall belong; IT IS ENACTED, "that such estate *pur autre vie*, in case there be no special occupant thereof, of which

"no devise shall have been made according to the 29. Car. 2. c. 3. or so much thereof as shall not have been so devised, shall go, be applied, and distributed, in the same manner as the personal estate of the testator or intestate."
 —See *Witter v. Witter*, 3. Peer. Wms. 102. and *Duke of Devon v. Atkins*, 2. Peer. Wms. 382.

Case 195.

* Nelson against Hawkins, Dean of Chichester.

Calling a clergyman "knave" not suable in the spiritual court.

ATTACHMENT UPON PROHIBITION. In this case the plaintiff declared, that the defendant libelled against him in the spiritual court, for calling him "knave."

S. C. 1. Ld. Ray.

Whereon the defendant demurred.

423.

S. C. Com. Rep.

25.

S. C. Holt, 593.

2. Inst. 492.

4. Co. 20.

7. Co. 44.

Cro. Car. 110.

2. Roll. Abr.

296, 297.

3. Lev. 17.

Lutw. 1054.

7. Sid. 393.

Str. 471. 545.

187. 555.

6. Com. Dig.

§vo. 132.

HOLT, Chief Justice. It will be hard to grant a consultation; the party has not accused THE DEAN of any dishonesty in his profession, which may make him liable to ecclesiastical censures; if he had so done, it would have been reasonable to let him sue there; but now the case is only, whether we must be more tender of the reputation of a clergyman than that of another man; for which there is no reason (a). The reason why laying violent hands on a clergyman in the ecclesiastical court was punished by excommunication was, because he having *habitum et tonsuram*, by which he was known to be such, an assault on him was deemed an assault to the whole clergy, and so a kind of spiritual offence.

And in *Hilary Term* THE COURT gave judgment *quod flet prohibito*,

(a) See *Coxeter v. Parson*, post. 231.

Case 196.

Lindsey against Clerk.

Capiatur taken away in trespass.

THE COURT. The *capiatur* in trespass is wholly taken away by the statute 5. & 6. *Will. & Mary*, c. 12.; therefore the judgment now should be entered, omitting *quod capiatur*.

S. C. 5. Mod. 285. S. C. 1. Salk. 54. S. C. Carth. 390. 3. Bl. Com. 398, 399.

Case 197.

The King against Gluff.

Where a statute prescribes, that a thing shall be by bill, plaint, or information, it cannot be by indictment.

INDICTMENT before commissioners of *oyer and terminer* at THE OLD BAILEY, and removed on *certiorari*.

4. Inst. 165.

The indictment was on the 1. & 2. *Phil. & Mary*, c. 7. for selling haberdashers wares contrary to the statute, on pain of forfeiture, one moiety to the king, the other to him that will sue for the same "in any of the king's courts of record, by bill, plaint, or information, or otherwise."

NORTHEY moved to quash it, on the authority of *Gregory's Case* (a) and the case of *Farrington v. Keymer* (b), because the general words, "of the king's courts of records," extend only to those of *Westminster*.

PER CURIAM. It is true, the justices of peace cannot hereby have jurisdiction; but it has been ruled since *Gregory's Case*, that

(a) 6. Co. 29. b.

(b) 1. Cro. 112.

justices

justices of *oyer* and *terminer* may by way of INDICTMENT, * but not by way of INFORMATION, and therefore in that respect it is well enough ; but here the statute has prescribed a particular way for the recovery of the forfeiture, *viz.* " by action of debt, information, &c." without saying anything of " indictment ;" and therefore it is a question, whether this be indictable or no ?

THE KING
against
GLUY.

For which reason let it be quashed *nisi* (a).

(a) Where a statute creates a new offence, and appoints certain particular remedies of which an *indictment* is not one, the particular remedies appointed by the statute can alone be pursued, *Rex v. Penfax*, Bar. K. B. 127. 2. Sess. Cases, 172. But where new-created offences are only prohibited by a general prohibitory clause, an indictment will lie, *Rex v.*

Wright, 1. Burr. 544. although there be afterwards a particular provision and a particular remedy given, *Rex v. Robinson*, 2. Burr. 803.—See also *Rex v. Balure*, Cowp. 650. *Rex v. Davis*, Sayer, 133. *Rex v. Boyal*, 2. Burr. 832. *Rex v. Harris*, 4. Term Rep. 202. and the note to *Rex v. Marriot*, 4. Mod. 144. 1. Show. 398.

Wall against Dukes:

Case 198.

TRESPASS. After a verdict for the plaintiff it was moved in arrest of judgment, because the trespass was only laid to be *diversis diebus et vicibus*, without laying any particular time. Laying no particular time in trespass cured by verdict.

PER CURIAM. It is well enough after verdict, on the same reason with the case of *Blackhall v. Eccles* (a) this Term.

(a) Ante, 102.

Anonymous.

Case 199.

HOLT, Chief Justice. An *audita querela* is no *superfedeas* in itself, being not like a writ of error ; but the party may go on with his execution until there be a special *superfedeas*; and though an *audita querela* be allowed, no *superfedeas* shall be granted until the matter whereupon the *audita querela* is grounded be proved by two witnesses, *Audita querela* is no *superfedeas* until there be a special *superfedeas*.

Hartop against Holt.

Case 200.

JUDGMENT was given in debt in this court, and affirmed in a writ of error in the exchequer-chamber, and sent back hither. Then goes out a *scire facias* why execution should not be awarded on the judgment, and thereupon execution is awarded ; and afterward *Holt* brings a writ of error *tam in redditione judicii, quam in adjudicatione executionis*, returnable in the exchequer-chamber ; notwithstanding which the plaintiff takes out execution. Error will not lie in the exchequer-chamber, on *scire facias* to execute a judgment which had been affirmed in the exchequer-chamber.

The question was, Whether this writ of error be a *superfedeas* ?

S. C. 5. Mod. 229. S. C. Comb. 293. S. C. 12. Mod. 105. S. C. 1. Ld. Ray. 97. S. C. Ray. Ent. 95. Comb. 12. 264. 8. Mod. 121. 147. 373. Fitzg. 175. 5. Com. Dig. "Pleader" (3. B. 12.). 2. Bac. Abr. 209. 4. Bac. Abr. 410. S. C. Salk. 263.

HOLT,

Michaelmas Term, 8. Will. 3. In B. R.

HARTOP
against
HOLT.

HOLT, *Chief Justice*. It is plain, that no writ of error in this manner lies on the first judgment; and if such a one be taken out, it is no *superfedeas*, because one has been brought already on the first judgment; and they have affirmed it, whereby they executed their authority, and have no power to examine their own judgment; so that supposing this writ of error to lie on the *scire facias*, yet it will not lie on the principal judgment, or be any *superfedeas* thereunto: but then supposing it to lie on the *scire facias* alone, whether it would be good for that part and * void for the rest; so the whole question is, Whether a writ of error lies upon an award of execution in a *scire facias* grounded upon a judgment in the exchequer-chamber? I think this writ of error will not lie, and is no *superfedeas*, because it is neither within the letter nor meaning of the act, being for a matter arising since the first judgment, and nothing relating to the merits of that.

* [106]

Vide 1. Vent.
168, 169.

Postea, Hil.
8. Will. 3. Co-
niers v. Manu-
captors of Raw-
lins.

1. Cro. 143.

464.

2. Vent. 38.

Wherefore THE COURT assented, that no writ of error lies on this *scire facias*, and that execution was well taken out. *Nota diversitatem*, 1. Vent. 168, 169.

Cafe 201.

Byron against Emes.

Saying a woman
had a bastard, to
hinder her of her
marriage, which
was then in
communication
with A. not ac-
tionable.

S. C. Comb. 391.

S. C. Salk. 693.

1. Roll. 34.

3. Sid. 396.

1. Com. Dig.

290. 274.

ACTION ON THE CASE for scandalous words, wherein the plaintiff declared, she was a chaste virgin, and of good fame; and that whereas J. Chapman was in communication of marriage with her, the defendant *præmissorum non ignarus*, to defame her, and hinder her of her marriage, said of her, "What do you go to London for but to drop your stink;" with averment, that where the words were spoke "stink" signifies "bastard;" as also, "that she went to London last winter to lie-in, and to my knowledge several people have lain with her." Upon issue joined, and verdict for the plaintiff,

IT WAS MOVED in *arrest of judgment*, that the words are not actionable, because they are of a spiritual consufance, and no temporal loss accrues; that to say "a woman has a bastard" was never actionable before the statute for provision of bastard children; and since the statute, it has never been held to be actionable but where the party is brought within the penalty of the statute, which is only where the bastard becomes chargeable to the parish. These words are most scandalous of a young woman; so that were it *res nova*, perhaps an action would lie; but there are many authorities to the contrary. It is a crime of which the ecclesiastical court has consufance, and can censure; and it is not reasonable that the party should be liable to defamation and an action too; on which account *Anne Davis's Case* hath been often shaken. In this case, the having the bastard is not the crime, but the fornication, of which the party is an undeniable evidence.

Judgment for the defendant (a).

(a) 1. Roll. Abr. 35. 3. Buist. 43. Cro. Eliz. 639. Cro. Car. 522. 1. Lev. 261. Salk. 696.

Yeoman

* Yeoman against Bradshaw.

Case 202.

PER CURIAM. The whole question is, Whether a bill of exchange shall draw administration to the province or diocese where the bill is, or where the acceptor, who is obliged to pay it, lives. Now though a bill of exchange be in writing, yet in judgment of law it is of no higher nature than a simple contract; and therefore it must follow the rules of debt upon simple contract, and administration is to be committed where he who pays it lives.

PER CURIAM. Judgment *quod billa cassetur.*

A bill of exchange is only a simple contract, and *assumpsit* only where the debtor is.
S. C. Carth. 373.
S. C. 3. Salk.
70. 164.
S. C. Comb. 392.
S. C. Holt, 42.

White against The Bishop of Worcester.

Case 203.

TRESPASS AND EJECTMENT against seven defendants; who all appeared and pleaded, and joined issue on the plea-roll; the *jurata* and *distringas* was against all seven; only the issue on the *nisi prius* roll was joined by five only; verdict at the assizes against seven; and after several motions in arrest of judgment,

IT WAS RESOLVED by the whole Court, that the *nisi prius* roll was in this case amendable. *Blackmore's Case* (a) has these express words, "That the *nisi prius* roll is amendable, where the Judge has sufficient authority, express or implied, to try the cause." Now then here the Judge has an implied authority, for here is an issue joined on the record by all seven; if one issue had been joined by the five, and another by the other two, it had been otherwise. The *jurata* and *distringas* are against all seven to try this issue of "not guilty;" so that the Judge has plainly an implied authority to try the issue between the plaintiff and the seven; and that omission is plainly a misprision of the clerk; and therefore such a mistake in all actions and cases is amendable, and especially in this action of ejectment, where all seven are bound by rule of court to confess lease, entry, and ouster.

(a) 2. Co. 161.

If ejectment be against seven, who appear and plead, and issue be joined on the plea-roll against five only; and verdict against seven; the *nisi prius* roll is amendable.
S. C. 1. Salk. 48.
Comb. 393.
1. Ro. Ab. 200.
Poph. 102.
Yelv. 64.
Cro. Car. 338.
Stiles, 339.
2. Mod. 316.
B. R. H. 21.
Stra. 843.
1. Will. 30.
1. Burr. 383.
1. Com. Dig.
8vo. 470.

* The King against Sir Thomas Culpeper.

* [108]

Case 204.

AT A TRIAL AT BAR, wherein mention is made of privilege of parliament,

HOLT, Chief Justice, said, that where it is said in our Books, that privilege of parliament is not allowable in *treason, felony, or breach of the peace*, it must be intended, where *security of the peace* is desired, that it shall not protect a man against a *supplicavit*; but it holds as well in case of indictments or informations for breach of peace as in case of actions.

Privilege of parliament does not protect a man where security of the peace is desired. *Quare*.
1. Will. 332.
Sayer, 50.
1. Burr. 671.

Michaelmas Term, 8. Will. 3. In B. R.

Case 205.

The King *against* Rainsden.

Order of justices to remove a man, not saying one of them was of the *quorum*, ill. **A**N ORDER OF TWO JUSTICES to remove *Rainsden*, likely to become chargeable to the parish, was quashed, because it was not said, that one of them was of the *quorum* (a); but if it had been at the sessions, it need not to have been said.

(a) But now by 26 Geo. 2. c. 27. no is of the *quorum* shall be impeached for order, &c. made by two or more justices that defect only.—See also 7. Geo. 3. c. 21. and 1. Bl. Com. 351.

Case 206.

Armstrong *against* L'Isle.

Till clergy had, not bailable in manslaughter. S. C. post. 109. 157. **P**ER HOLT, *Chief Justice*. We cannot bail *L'Isle* on a conviction of manslaughter before clergy had (a), unless a pardon be ready to be produced *sub pede sigilli*, and then we may, though attained of murder or treason; and so on a writ of error to reverse an attainder we may bail him, and bind him to prosecute a writ of error. S. C. 1. Kely. 89. 93. S. C. Trem. 20. S. C. Skin. 670. S. C. Carth. 394. S. C. Comb. 410. S. C. Salk. 60. S. C. Holt, 63.

(a) See S. P. Rex v. Keat, ante, 102.

HILARY

MILARY TERM,

The Eighth of William the Third,

I N

The King's Bench.

Sir John Holt, *Knt. Chief Justice.*

Sir Thomas Rokeby, *Knt.*

Sir John Turton, *Knt.*

Sir Samuel Eyre, *Knt.*

} *Justices.*

Sir Thomas Trevor, *Knt. Attorney General.*

John Hawles, *Esq. Solicitor General.*

* [109]

* Redwood against Coward.

Case 207.

ERROR out of THE PALACE-COURT in an action on the case.

Palace court.

S. C. Salk. 328

S. C. 5. Mod.

323.

S. C. 1. Ld. Ray.

147.

S. C. Holt, 272.

2. Satund. 96.

The error assigned was, that "*juratores assident damna*," where it should be "*assidunt*."

THE COURT adjudged either of them well enough, though neither of them proper.

Armstrong against L'Isle.

Case 208.

APPEAL OF MURDER. The appellee was brought to THE BAR ; and it was moved, that he might have his clergy, on his conviction of manslaughter, on an indictment whereon he was tried last assizes for Cumberland.

Appeal lodged

against A. con-

victed of man-

slaughter, but

not prosecuted ;

he was bailed

before clergy had.

S. C. ante, 108.

S. C. post. 157.

S. C. 1. Kely.

89. 93.

S. C. Trem. 29.

S. C. Skin. 610.

S. C. Carth. 394.

S. C. Comb. 410.

but S. C. Salk. 60.

S. C. Holt, 63.

HOLT, *Chief Justice.* There have been resolutions that the Judges may defer the allowance of clergy to a prisoner to expose him to an appeal. In the case of *Goring v. Deering* (a), the prisoner was convicted of manslaughter, and clergy respited ; and on an appeal brought, he pleaded all this matter ; but his plea was disallowed, by advice of all the Judges. I tried him on the appeal ;

(c)

I 2

Hilary Term, 8. Will. 3. In B. R.

ARMSTRONG
against
L'ESTR.

* [110]

but I must confess I was never satisfied with that resolution, being of opinion, that it is the duty of the Court to allow the prisoner his clergy the same assizes or sessions wherein he is convicted. The clergy in the time of *Edward the Third* complained, that after clerks were convicted of felony the Judges delayed the giving them their clergy, on suggestion, that there were other matters against them ; which they might do on this * account, because till the twenty-third year of *Henry the Eighth* clergy was allowed in all cases except treason ; and if a man had his clergy once, the delivering him over to the ordinary was an absolute discharge of all offences before clergy had : but notwithstanding this reason, they complained thereof ; whereupon 25. *Edw.* 3. c. 5. was made, which stands unrepealed, whereby it is enacted, " that a clerk shall be presently arraigned for all his offences, or otherwise delivered to the ordinary ;" where by the word " presently" is meant the same sessions or assizes, i. e. the party shall have his clergy the same sessions, &c. wherein he is convicted. Now then, if by this statute the party must have his clergy the same sessions wherein he is convicted, and you have lodged an appeal, you may go on herewith ; but if you will not go on, you must not delay him of his clergy. The 3. *Hen.* 7. c. 1. provides, " that *auterfois convict* shall be no bar in an appeal, unless clergy had ;" the design whereof was to save the right of the church, by which the having of clergy was a discharge, not only for the offence for which he was convicted, but also for all other offences before ; so that having of clergy on conviction of manslaughter was a discharge of an indictment for larceny or other such crime. Before the statute of 18. *Eliz.* c. 7. if a man was guilty of two felonies, in one whereof he might have had his clergy, in the other not, and he had his clergy in one before he was arraigned of the other, the other was hereby discharged ; for remedy of which that statute was made. *Stone's Case*, in *Dyer*, 214. b. which is obscurely reported, is remarkable in this case : *Stone* had committed two felonies, in one whereof he might have his clergy, in the other not ; he was first indicted of the felony where clergy lay, and convicted, and had clergy, but no entry made of his being delivered to the ordinary ; and the next sessions he was convicted of the other felony, but judgment was respited ; and the advice of all the queen's Judges and Serjeants was taken, whether he should have judgment to be hanged, or delivered to the ordinary ; but that being not done, they were divided seven against seven ; but at length the opinion of the latter seven prevailed, that he should not be hanged, because if he had had his clergy, it would have been a discharge of all other felonies committed by him before that conviction ; and the delay thereof being the act of the Court, should not turn to his prejudice. Now I think a man, notwithstanding his being found guilty of manslaughter, may be appealed the same sessions before clergy had : But, to make no determination * in this point, we are to consider now, whether he may be bailed. *Co. Ent. tit. " Indictment,"* there was an indictment at the assizes for murder, the party found guilty of manslaughter, the conviction removed into this court, where he was bailed.

Vide 1. Sid. 316.

* [111]

Wherefore

Hilary Term, 8. Will. 3. In B. R.

Wherefore *per* HOLT, Chief Justice, ET TOTAM CURIAM, Let him be bailed; and after his clergy was allowed him, for the reasons before given by HOLT, Chief Justice.

ARMSTRONG
against
L'Isle.

Anonymous.

Case 209.

HOLT, Chief Justice. If you have not regular notice of trial, yet if you make defence, and do not depend on that, you cannot afterward take advantage of it.

Notice of trial.

Hicks against Woodison.

Case 210.

ATTACHMENT ON A PROHIBITION, wherein the plaintiff declared, that the hundred of *Huntspittle* was an ancient hundred time out of mind; and that within the hundred, time out of mind, there had been a custom for all the inhabitants thereof to be free and discharged from the payment of any tithes for the agistment of barren cattle. The defendant traversed the custom; and on issue joined, a verdict was given for the plaintiff that there was such a custom.

A county or hundred cannot prescribe in non decimando for anything titheable of common right.

IT WAS MOVED in arrest of judgment, that there can be no such custom in non decimando for anything but wood, because that is not due of common right.

S. C. 4. Mod. 336.
S. C. 2. Salk. 655.

AND IT WAS ADJUDGED, that no county or hundred can prescribe in non decimando for anything that is titheable of common right, and that this prescription is void and illegal. There is no instance of such prescription, but of wood, but one, *Kidden v. Edwards* (a). Wood was only titheable by particular custom until the canon of *Stradford*, in the seventeenth year of *Edward the Third*, because it is not annually renoyant, i. e. not producing annual profit.

S. C. Carth. 322.
S. C. Comb. 403.
S. C. Holt, 671.
S. C. Skin. 360.
S. C. 1. Ld. Ray. 137.
S. C. Ray. Ent. 170.
Fitzg. 79.
Com. Rep. 636.
3. Com. Dig. "Dimes"
(E. 4.).

Wherefore a consultation was awarded.

5. Bac. Abr. 54.

(a) 1. Roll. Abr. 654.

The King against Burdett.

Case 211.

IF THE JURY eat and drink at the charge of the party for whom the verdict is found, it avoids it; but if at their own charge, they are only fineable (a).

(a) See *Harebottle v. Placock*, Cro. 1. Ld. Ray. 148. *Foster v. Hawden*, Jac. 22. *Littleton v. Hunkleton*, Dyer, 2. Lev. 205.—See also 2. Hawk. P. C. 78. 2. Anonymous, Dyer, 218. 2. Ch. 22. f. 18. 3. Bac. Abr. 282. *Ken v. Burdett*, 2. Salk. 645. S. C. 2. Hale, 196. Bull. N. P. 308.

Anonymous.

Case 212.

HOLT, Chief Justice. The sessions cannot indict for petty treason.

Case 213.

* Anonymous.

Misdemeanors
in bankruptcy
are cognizable in
the king's
bench.

THOUGH the commission of bankruptcy be taken out of chancery, and you must apply there for superseding it, yet all misdemeanors in the executing it are conusable here.

Case 214.

Coniers *against* The Manuaptors of Rawlins.

Bail cannot plead
payment before
the return of the
second *scire fa-*
cias ; for the
recognizance is
broken before
suing the first
scire facias.

Postea, Mich.
10. Will. 3. The
King v. Moor.
Mich. 13. Will. 3.
The King v.
Love.

In what case
"de debito" may
be rejected.

1. Cro. 464.

143.

2. Cro. 171.

1. Vent. 38.

169.

Cro. Car. 300.

Hob. 72.

SCIRE FACIAS against bail. They come in and plead, that before the return of the second *scire facias* the defendant in the original action paid the money. To which the plaintiff replied ; and instead of the defendant concluding to *the country*, an issue being tendered, concluded with an *hoc paratus est verificare*. Whereupon the plaintiff demurred.

PER CURIAM. Bail may plead payment by the principal, but it must be in a right manner, which is not done in this case, because the recognizance was broke before the suing the first *scire facias* ; and therefore pleading payment before the return of the second has not the colour of a good plea.

Whereupon SHOWER urged, that the plaintiff could not have judgment, because he prays execution *de debito et damnis*, whereas it should have been *de damnis* only ; for the recognizance in the king's bench being not in a sum certain, there can be no debt created in the bail thereby.

PER CURIAM. We will reject "*de debito*" as surplusage ; wherefore let the plaintiff have judgment.

After which the defendant brought a writ of error returnable in the exchequer-chamber : but on motion the plaintiff had leave to take out execution ; for no writ of error lies on a *scire facias* against bail there. *Ante*, 106.

Case 215.

Anonymous.

Inquisition be-
fore a coroner,
certi *pro damnis* ill.

SIR BARTHOLOMEW SHOWER moved to quash an inquisition taken before a coroner, whereon the jury find, that a post in the highway was *unica causa movens ad mortem* ; and he excepted to it, because it was *nos certa credimus esse causam mortis*, whereas it ought to be certain ; and therefore it was quashed.

Case 216.

Bands *against* Bodiner ;

AND

Stope *against* Bodiner.

Privilege of at-
torney.

S. C. Carth. 377.

Tidd's Pract.

76.

TROVER. The defendant pleads, that he was an attorney of the court of common pleas, and so pleads his privilege. The plaintiff replies, that at the time of exhibiting the bill he was in *custodia*

* *custodiâ marſch.* at the ſuit of *J. S.* and that the defendant was delivered out upon bail; *ſuper quo* the plea between them not being determined, the plaintiff, according to the cuſtom of this court time out of mind, filed his bill, as it was lawful for him to do; whereupon the plaintiff demurred.

BANDS
againſt
BODINER,
AND
STONE
againſt
BODINER.

And *PER CURIAM*, The being in cuſtody of the marſhal does not hinder a man of his privilege. The Court indeed, in 27. *Hen. 6.* ſ. were of opinion, that if he be actually in cuſtody of the marſhal, he cannot be ſued in any other court; and if he be, a *ſuperſedeas* ſhall go; but this was only for the privilege of the defendant. The only privilege which the plaintiff has is juſt to ſue him while he is there; but if a defendant has privilege not to be ſued there, he may have the advantage thereof. In this caſe, it does not appear but that the defendant may have privilege againſt him who firſt brought him into cuſtody of the marſhal; and if ſo, it is ſtrange he ſhould not have it againſt the plaintiff that grafts thereupon. If indeed he had ſubmitted himſelf in the firſt action to the jurisdiction of the Court, he ſhould not have his privilege in the other; but then you muſt have ſhewn it in your replication, and relied upon it as matter of eſtoppel; which having not done, we muſt allow privilege.

Being in cuſtody of the marſhal on bail filed, unleſs in actual cuſtody, does not hinder an attorney of his privilege. Poſtea, Trin. 13. Will. 3. Wilbraham v. Lowndes. Ante, 102.

Anonymous,

Caſe 217.

EJECTMENT on a demife by a corporation aggregate. Verdict for the plaintiff in the court of common pleas.

By confeſſing leaſe, entry, and ouſter, the demife is confeſſed to be good.

Error brought; and objected, that the demife is not ſet forth to be by deed.

Judgment affirmed; for the demife is confeſſed to be good by confeſſing leaſe, entry, and ouſter; and the jury could never have found for the plaintiff, if there had not been a good demife.

Cro. Jac. 166. Run. Eject. 221, 222.

The King againſt Shaw.

Caſe 218.

MANDAMUS to reſtore *Shaw* to the place of one of the burgeſſes of *Wilton*; and after argument on both ſides, a peremptory *mandamus* was granted, becauſe the crime for which they removed was not well alledged in the return.

Bad return to *mandamus*.

The King againſt Clerk.

* [114]
Caſe 219.

HABEAS CORPUS to the keeper of *Newgate* to bring up the body of *J. Clerk*, committed for not taking upon himſelf the livery of the *Vintners Company*.

The cuſtom of *London* to commit a freeman who reſuſes to take up his livery is good.

Hilary Term, 8. Wm. 3. In B. R.

The King
against
Bernard.

The keeper of *Newgate* returned, that the city of *London* is an ancient city; and that time out of mind there have been several companies, guilds, and fraternities, within the city, among the rest the COMPANY OF VINTNERS, and that they had time out of mind used to chuse out of the freemen certain persons, who were to take upon them the livery of the said Company; and that there has been time out of mind a court held before the mayor and aldermen of that city, which court has the government of all Companies; and that upon complaint made before them, by the master and wardens of any Company, of any person duly chosen on the livery that did refuse, &c. that the court of aldermen used to commit such persons to the sheriff, or some other officer of the city, *quousque consentiret et declararet* that he would take upon himself the said office, or otherwise be discharged by due course of law: that Clerk was duly chosen a liveryman, &c. and that the court of aldermen, by a warrant in writing, did commit him to me, the said keeper of *Newgate*, *quousque*, &c.

PER TOTAM CURIAM. . . The custom is good.

A commitment by the court of aldermen, returned to be "to the keeper of *Newgate*," is not good, without saying that he was an officer of the city.

Ante, 75.

S. C. Comb. 411.

S. C. 3 Mod. 319.

S. C. Salk. 349.

S. C. 3. Salk. 62.

1. Bac. Ab. 671.

Vide postea.

Falch. 13. Will.

3. Walmscot 4.

Tiler.

681..

But because it did not appear on the return, that the keeper of *Newgate* was an officer of the City, to which the commitment must be, according to the custom, therefore he was discharged.

And HOLT, Chief Justice, took this diversity, that where it appears that the person to whom the commitment was made was an officer of the court, as the marshal here, or the sheriff, in case of commitment by justices of oyer and terminer, there needs no averment of such a person to be a proper officer; but here it does not appear, that the keeper of *Newgate* is a proper officer for the city of *London*, attendant on that court: we know the sheriffs of *London* are keepers of *Newgate*, and that all persons in the custody of the keeper of *Newgate* are in the custody of the sheriffs; but we cannot judicially take notice of it. So on the statute of Recusants, which forbids a recusant convict to come within five miles of *London*, which sends members to parliament, and the commitment was for coming within five miles of *London*, and it not appearing that *London* sent members to parliament on the return, the return was ill, and the party discharged, though every one knows *London* does send members to parliament.

* [115]

Case 220,

* The King against Bernard.

Constables at common law are to be elected in the last, and in default thereof at the sheriff's court.

But by

custom a corporation may elect them, but that must be by custom, which must be specially shewn.

S. C. Salk. 302.

S. C. 1. Ld. Ray. 94.

Dough. 536.

INDICTMENT at the sessions of the town of *Southampton*.

That at the general quarter sessions for the town and county of *Southampton*, Thomas Bernard, of the city, grocer, then and there resident, was, by the mayor, bailiffs, and burgesses of the said town, debito modo secundum consuetudinem villæ electus to be constable for

the town of *Southampton*, but by custom a corporation may elect them, but that must be by custom, which must be specially shewn.

S. C. Salk. 302. S. C. Skin. 669. S. C. Comb. 416. S. C. Holt, 452. S. C. Sett. & Rem. 214.

S. C. 1. Ld. Ray. 94. 1. Mod. 13. Post. 180. Sir. 752. 1050. 1149. 1213. 1. Bac. Abr. 439.

Dough. 536. 3. Hawk. P. C. ch. 10. f. 49.

the

HILARY TERM, 8. WAL. 3. IN B. R.

the year ensuing; whereof he had notice the fourth of *October*, and *admittus et ibidem requisitus fuit*; by two justices of the peace, *ad præsens*. *Sacramentum officii sui prædicti*; but that he, not minding his duty, *prædicto quarto die Octob. usque ad diem exhibitionis hujus bittæ*, obstinately refused to take upon himself the said office.

THE KING
against
BERNARD.

The defendant demurred.

FIRST, Because by common law constables were only chosen by leets; and in default of them at the tourn; and if there be a custom in a corporation to chuse them otherwise, it must be averred that they had such a custom immemorial, it not being sufficient to say, *ab initio modo secund. consuetudinem*.

SECONDLY, Supposing such a custom in a corporation to chuse them otherwise, it can only bind the members, and not others; and therefore they should have averred *Bernard* to have been a member.

THIRDLY, Supposing him to be duly elected, it does not appear but that he took upon him the office; for notice of his election and requiring to take on him the office was on the fourth of *October*, and the refusing is laid to be on the *quarto die Octobr.* too.

PER CURIAM. The last objection is material; for he might have taken the oath the fourth of *October*, which would have been an assumption of the office, after which he is only indictable for a special neglect, *i. e.* the neglect must be specially laid. As for THE SECOND: Supposing such a custom within a corporation, they may without doubt not only meddle with their own members, but also with the residents within their precincts. But THE FIRST is most considerable. At common law they were elected at the leets, and in default at the sheriff's tourn, the leet of the county. But by custom, a corporation might chuse its own officers; and this custom is reasonable; because when an incorporate town has the government thereof committed to them, it is but reasonable they should chuse their officers that are necessary to secure the public peace; but then it should have been particularly set forth, which is not done here. Vide 3. Co. 38. a.

Judgment was therefore given for the defendant.

• The King against Morgan Rees.

[116]
Case 221.

MANDAMUS to the archdeacon of *Cardigan* to swear *Morgan Rees* churchwarden, setting forth a custom therein by the parish to chuse a churchwarden, and that according to the custom they had chosen, &c.

The archdeacon returned, that they had such a custom, and that *Rees* was lawfully chosen; but that it was proved in the archdeacon's court that *Rees* was not chosen by the parish, but by the churchwarden, and that the parish was not bound to answer for him.

S. C. 3. Salk. 90. S. C. 5. Mod. 325. S. C. Comb. 417. S. C. Carth. 393. S. C. Sett. & Rem. 216. S. C. 2. Ld. Ray. 138. 3. Mod. 333. 1. Bl. Rep. 28. 3. Eurr. 1440. 3. Bac. Abr. 531.

con's

Hilary Term, 2. Will. 3. In B. R.

THE KING
against
MORGAN
RENT.

don's court, that he was a poor dairy-man and servant, and that he had no real estate or personal one, and was unfit for the office, and that therefore they discharged him; and then he certifies to the Court, that being *pauper lactarius et servus*, and *minus habilis et idoneus ad exequendum officium præd.* he could not swear him.

And PER CURIAM, A peremptory *mandamus* was granted.

HOLT, Chief Justice. He is a temporal officer, and the goods of his parish are in his custody, and he may have trespass for them; and they are by law a corporation. The parishioners may trust whom they please, though he be insolvent, but it is at their peril. The canon says, "the minister shall chuse one;" that is only by custom where they have so done; and the canon only confirms that ancient usage, and that was at first by some compulsion.

Case 222.

Anonymous.

Marshalsea
court.

PER HOLT, Chief Justice. If a record comes here out of the Marshalsea, you cannot have execution larger than the Marshalsea; but if by writ of error, you may have execution, on the affirmance of the judgment, all over England.

Case 223.

Hooper against Pierce.

Award of all
matters, at the
time of the a-
ward 1799.
S.C. 1799.

DEBT UPON A BOND to stand to the award of two, and if they could not agree, to nominate an umpire; and the submission was "of all actions, suits, and demands," to the time of submission. The defendant pleaded "no award" made; the plaintiff in his replication sets forth an award made by the umpire, viz. that they should mutually release all demands to each other to the time of umpirage, and assigns a breach. The defendant demurs.

And it was objected, that this award was void, because releases are appointed to be made of a time out of the submission.

SED PER CURIAM, Though antiently such an opinion might have * obtained, yet for a long time such an award has been held good; and that for two reasons: FIRST, It shall not be intended, unless the contrary be shewn, that any other matter arose between the submission and the making the award; and if no matter did arise, the arbitrator has awarded no more than he should do. And since that, a second reason has been added, that supposing other matters to have arisen, yet as to that the award is void, the general words being to be expounded of "all matters in controversy at the time of the submission," and as to other matters arising since to be void; and if in such case the party submitting to the award should make a release to the time of the submission, it would be a good performance of the award.

Judgment was given for the plaintiff.

The

Hilary Term, 8. Will. 3. In B. R.

The King against Tumock.

Case 224.

INDICTMENT FOR AN OFFENCE "*ad generalem sessionem*," without saying "*generalem quarterialem*," is a case where the statute appoints it to be at the general quarter sessions; and is quashed.

Where a statute appoints an indictment to be at a general quarter session an indictment at a general session is ill.

The King against The Earl of Ailesbury.

Case 225.

THE EARL OF AILESBUURY moved to be bailed, and several reasons urged by Counsel.

Person bailed by the discretionary power of the court.

But they bailed him by virtue of the discretionary power which the Court has, without any regard to its being in or out of the *Habeas Corpus* Act, but considering the length of his imprisonment, his indisposition of body (a), and that Goodman, who was sworn to be a material evidence against him, was here in England several months after my Lord's imprisonment, and that during all that time he was neither indicted nor prosecuted (b).

S. C. Comb. 431. S. C. Salk. 303. S. C. Holt, 84. Vide ante, 66.

(a) See Elizabeth Smallbridge's Case, Cro. Jac. 356. William de Walter's Case, Co. Lit. 289. a. Ellen Allott's Case, 12. Co. 126. Herbert v. Vaughan, Latch, 12. Harry of Coomb's Case, 20. Mod. 334. Rex v. Rudd, Cowp. 333.

(b) Rex v. Bell and his Wife, Andr. 65.

Gale against Ewer.

Case 226.

LIBEL BY A PARSON in the spiritual court on the statute of 2. Edw. 6. for not setting forth of tithes, consisting of various articles; and the defendant not appearing, he was excommunicated for it.

A parishioner is not bound to give notice of the setting-out of his tithes.

And now he prayed a prohibition, because one of the articles was for not giving notice of the setting out of tithes.

[118]

PER CURIAM. Let it go; because a parishioner is not bound, either by common law or statute, to give the parson notice of the setting forth (a).

S. C. Com. Rep.

And so went *quoad extraponendo decimas*.

22.

(a) See Butter v. Neathby, 3. Burr. 1892. that a custom "that notice should be given to the owner of the tithes of

2. Ven. 48.

Camb. 128.

Carter, 143.

3. Burn's E. L.

475.

3. Burr. 1893.

3. Com. Dig.

"Dimes" (L).

The King against Keat.

Case 227.

WE have considered of the fact and the whole record; and as to the indictment on the statute of Stabbing, that is apparently vicious; for the indictment is, that he drew his sword and stabbed saying anything of a weapon drawn, ill.—S. C. Salk. 47. 103. S. C. Comb. 406. S. C. Skin. 666. S. C. Holt, 481. S. C. 5. Mod. 287. S. C. 1. Ld. Ray. 138. 3. Bac. Abr. 567. 671. 4. Bl. Com. 176. Foster, 291.

Indictment for murder, he not having first struck, without

James

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THE KING
against
KEAT.

James Wells, he nothaving first struck, without saying anything of a weapon drawn, and concludes *contra formam statuti*; for which reason let it be quashed.

Then as to the indictment of murder at common law, it is nonsense in the beginning; for it says, "that the said *J. K.* made an assault on *James Wells*, and the said *J. Keat præfat. Jacobum Wells* with a certain sword of the value of five shillings, which he the said *J. K.* in his right hand had and held, *præfat. Jacobum Wells pupugit et percussit*;" wherein there is a *præfat. Jacobum Wells* too much, and so is nonsense.

Then there is another thing which is very odd, though it may not be error, because it may possibly be a sufficient description; the indictment says, he gave him a mortal wound *latitudinis unius pollicis*, and *profunditatis in et per corpus*.

Let it be quashed.

And he was bailed to appear at the next general gaol-delivery for the county of *Wills*.

EASTER

E A S T E R T E R M,

The Ninth of William the Third,

I N

The King's Bench.

Sir John Holt, *Knt. Chief Justice.*

Sir Thomas Rokeby, *Knt.*

Sir John Turton, *Knt.*

Sir Samuel Eyre, *Knt.*

} *Justices.*

Sir Thomas Trevor, *Knt. Attorney General.*

John Hawles, *Esq. Solicitor General.*

* [119]

* The King against Greenvelt.

Cafe 228.

MOTION to discharge *Dr. Greenvelt*, committed by the censor of the *College of Physicians pro malâ praxi* in the year 1692, chiefly because this offence is pardoned by two general acts of pardon since.

Where a crime is pardoned, all the effects and consequences thereof are also discharged.

THE COUNSEL for the *College* insisted, that though a general pardon pardoned all public offences, yet it did not release any private right; that this penalty *pro malâ praxi* was not only a public infliction, but also a satisfaction in part to the party. But suppose it were only a public punishment, the king having granted the fines to the *College*, he could not by the pardon destroy his own grant; and therefore that these fines remain notwithstanding.

S.C. 1. *Ld. Ray.*
252.
5. Co. 47.
6. Co. 13.
Dyer, 249.

But PER CURIAM *seriatim*, The penalty *pro malâ praxi* is only a satisfaction to the public justice, and not to the party who had his action on the case; and that whenever a crime is pardoned, all the effects and consequences thereof are discharged (a): that when an act of parliament appoints a fine for a public offence, such fines of common right belong to the king, unless they are

(a) See *Cuddington v. Wilkins*, Hob. 62. *Rex v. Crosby*, 5. Mod. 16. and *Thomas Reilley's Case*, *Cases in Crown Law*, 2d edit. 360.

otherwise

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The King
against
Gashard & T.

otherwise particularly disposed; that the king, by granting away his fines, does not extinguish his power of pardoning, for that would be an extinguishment of his prerogative by implication; and the power of pardoning being inseparably annexed to the crown, and not grantable over, the king therefore pardoning this offence before the fine actually imposed, whereby an interest would have vested in the grantee, the offence was thereby gone; and thereby the penalty depending thereon discharged.

The prisoner was discharged.

* [120]

Case 229.

* Reynolds against Gray.

Award by an umpire before the time of the arbitrators is expired, is void. **MOTION** for an attachment against the defendant for refusing to perform an award by an umpire, on a submission by rule of court, which after some dispute was referred.

S. C. 1. Salk. 79.
S. C. Sayer, 222.
S. C. 1. Ld. Ray. 222.

It was held, and agreed *PER CURIAM*, that if the submission be to refer the matter in controversy to arbitrators, and if they do not make an award by such a day, that they shall make an umpire; that there the arbitrators cannot chuse an umpire until the day be past for the making their award (a); and when they have chosen one generally, they cannot afterward chuse another, because they have executed their authority; but if they chuse him on condition that he will accept it, and he refuse, they may chuse another, because they never executed their authority (b).

(a) But see Wood v. Doe, 2. Term Rep. 644. contra.

(b) Michel v. Harris, post. 512.
S. C. Salk. 71. S. C. 1. Ld. Ray. 671.
—But see Chace v. Darc, T. Jones, 168.

Cowell v. Waller, 2. Bar. K. B. 154.
Bardel v. Harris, Freeman. 378. Adam's Case, 2. Mod. 169. Trippet v. Eyres, 3. Lev. 236. and Mr. Kyd's Treatise on the Law of Awards, 46. 58.

Case 230.

Hallett against Birt.

Hundred court can only grant replevins in court, though doubtful whether they can do it there.

S. C. 5. Mod. 252.
S. C. 1. Salk. 394.
S. C. 2. Salk. 580.
S. C. 3. Salk. 274.
S. C. Carth. 380.
S. C. Skin. 674.
S. C. 1. Ld. Ray. 218.

TRESPASS for taking his cattle at Bemister, in Gloucestershire.

The defendant pleads "not guilty" as to all but three cows; and as to them he pleads, that the hundred of Bemister is an antient hundred, and that long before the trespass committed the Bishop of S. was seised in fee, in right of his bishoprick, of the said hundred; and that he and all his predecessors, and those whose estate he hath, had time out of mind a court therein for all personal actions under forty shillings, and of replevins in the hundred, to be held before the suitors thereof from three weeks to three weeks; and that time out of mind the bishop and all those, &c. or their stewards, on plaint made to them, or their stewards, in the said court, or out of court within the hundred, of any unjust taking and detention within the said hundred, have used to make deliverance thereof: that the Bishop of S. conveyed the said hundred to C. W. Esq. who made H. S. his steward; and that after this the plaintiff *cepit et imparcavit*

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esset three cows of one A. who thereupon complained to H. S. ^{11 Assizes} and finding pledges *de prosequend. et returns habend. H. S.* by a certain warrant under his seal, directed to the bailiff of the hundred of Benistur and the defendant, commanded them to take and replevy the said cows; by virtue whereof he took and carried them away; which is the same trespass; *ASSQUE HOC*, that he is *guilty* [121] *aliter aut alio modo.*

The plaintiff demurred, shewing for cause, that it amounted to the general issue.

And *PER CURIAM*, It does amount to it. As to special pleading, we take this rule; that wherever the defendant shews a cause of action in the plaintiff, either express or implied, and confesses and avoids it, it is a good plea; for by confession and avoidance, he confesses the plaintiff has cause of action against him, were it not for some special matter in law; by which is not meant a question in law, but a thing which in law avoids the cause of action, as sale in market overt, and without leaving a cause of action it will amount to the general issue; and this is the reason of *colour*. Now here the defendant has shewed, that the cattle were not the plaintiff's, but that he took the cattle of a stranger, and *imparscavit*, whereby they were *in custodia legis*; whereas if he had said *cepit et detinuit*, it might have been probably well enough. Then suppose the hundred-court might hold plea of replevin, which is hard to imagine, yet it must be as a court. The sheriff, before the statute of *Marlbridge*, could not grant a replevin out of court, much less a hundred-court, or court baron; and that enables only the sheriff to replevy out of court; and how can a thing be grafted on a prescription which had its original by act of parliament.

Judgment was given for the plaintiff.

The Duke of Norfolk *against* Alderton.

Cafe 231.

SCANDALUM MAGNATUM laid in *Middlesex*, and motion made for changing the *venue* on a common affidavit. ^{The Court will not change the venue in *scam*.}

But THE COURT refused it, and said they would not, unless upon special reasons (a). ^{S. C. 2. Salt. 668.}

S. C. Carth. 400. S. C. 1. Lev. 56.

(a) See *Steele v. Shalcroft*, Holt, 177. *Forrest*, 2. Stra. 847. and *Tidd's Prac.* Pref. 400. *Lord Griffin v. Buckley*, vice, 359. *Barnes*, 482. *Lady Falconbridge v.*

Bennet

Case 232.

Bennet against Talboys.

Declaration *contra formam statuti*, where some things are within the statute and others not, is good, for as to those which are not it is surplusage. **TRESPASS** for breaking and entering his close, and treading down his grass, &c. *necnon in eodem clauso venatus fuit, ANGLICE "did hunt," eodem defendente existente artifice inferiore, ANGLICE "an inferior tradesman," viz. pannario, contra pacem, et contra formam stat.* Verdict on not guilty for the plaintiff. **AND IT WAS MOVED** in arrest of judgment, that the conclusion of "*contra formam stat.*" goes to the whole count, and part of the trespass contained is not forbidden by any statute; wherefore the whole count is void.

S. C. Com. Rep. 26.
S. C. 1. Ld. Ray. 249.
S. C. Salk. 212.
S. C. Comb. 420.
S. C. Carth. 382.
S. C. 3. Mod. 397.
S. C. Holt, 667.

* It was answered; that there were three several trespasses laid in the count, which are distinct from each other, and so many several counts; so that "*contra formam stat.*" goes only to the latter, to which it is annexed.

HOLT, Chief Justice, said, If an act of parliament increase a penalty, or deprive a man of any benefit which he had before at common law, then if you count on the statute, and do not bring yourself within it, and conclude *contra formam stat.* it is naught. And if there be no act of parliament at all, and you conclude *contra formam stat.* it is only surplusage: so is the case of *Ward v. Ricbill (a)*.

But now the question is here, What shall be done on an act that gives an increase of costs, wherein it only restores the common law, which was taken away by 22. & 23. Car. 2. In this count are several trespasses alledged, the latter whereof is only within the statute, and the conclusion of the count is, "*contra formam, &c.*" which though in grammatical construction it goes to the whole count, yet in law it goes only to the hunting not being duly qualified; and why may we not apply it only to the latter part, and reject it as to the rest as surplusage, as was done on an indictment in the case of *Page v. Harwood (b)*.

Judgment for the plaintiff. And that seeing the hunting and breaking the close cannot be separated, the plaintiff shall have costs according to the new statute.

(a) 1. Vent. 103.

(b) Allen, 43, 44.

Case 233.

Parker against Mieller.

In replevin, **REPLEVIN.** The defendant pleaded in bar, "property, at the time of the taking, in a stranger, and not in the plaintiff's property," and so prayed a return. The plaintiff demurred. S. C. 3. Salk. 54. S. C. 1. Ld. Ray. 217. 1. Vent. 127. 249. 2. Lev. 92. 3. Keb. 219. 232. Cro. Jac. 519. Cro. Eliz. 596. Vide Mich. 2. *Ann*, *Pregrave v. Saunders*, in the King's bench, &c.

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PER CURIAM. Property, without doubt, may be pleaded in bar of the action in replevin; and if it be in the defendant, he may pray a return; but if it be in a stranger, unless he has the custody by bailment, and so makes a special avowry, it is a question, whether he can have a return.

But afterwards this Term IT WAS ADJUDGED, that the plea was good, though he had made no avowry at all, because he had the first possession; and it was not reasonable the plaintiff should retain, having no property; and so adjudged, that he should not have a return (a).

(a) See *Presgrave v. Saunders*, 1. Salk. 5. S. C. 6. Mod. 81. S. C. Holt, 562. S. C. 2. Ld. Ray. 914.

PARKER
against
MELLER.

* [123]

* The King against Page, Ingram, and Others.

Cafe 234.

INDICTMENT FOR A RIOT a calendar month and a day after the riot committed, before justices of peace *per sacramentum duodecim, &c. pro domino rege presentatum existit.*

Riot, where Inquisition is on view, the sheriff must be present, and the justices may make Inquisition after a month.

This indictment was on the statute of 13. Hen. 4. c. 7.

AND IT WAS RESOLVED,

FIRST, That where the inquisition is on view, there the sheriff must be present, but not where the inquisition or indictment is after the fact committed.

S. C. 2. Salk. 593.
S. C. Carth. 383.
S. C. Comb. 423.
S. C. 1. Ld. Ray. 215.

SECONDLY, The statute is only mandatory to the justices, under a penalty, to make inquisition within a month, but does not prohibit the doing it after the month, which they may, if they will, lawfully do.

See 2. Hawk. P. C. 7th edit. ch. 65. page 60 to 71. where all the law upon this subject is collected.

THIRDLY, This being a special inquisition, it is always *pro domino rege*; but if it be at the assizes, or before justices of oyer and terminer, then it is *pro corpore comitatûs*.

Head against Tyler.

Cafe 235.

HOLT, Chief Justice. If there be a copyhold estate for life, remainder to B. and the tenant for life forfeit, it is not such a determination as to let in the remainder; but THE LORD shall enjoy it during the life of tenant for life.

Forfeiture of tenant for life of a copyhold.

9. Co. 107. 2. Roll. Abr. 509. 3. Com. Dig. "Copyhold" (M. 6.). and Dec Tarrant and Others v. Hellier, 3. Term Rep. 163. 173.

S. C. Holt, 161.
1. Saund. 151.
on the demise of

Cholmely against Bloom.

Cafe 236.

DEBT AGAINST THE DEFENDANT *in custodia marisballi*, on a bond made at Chester. The defendant pleaded, he was, at the time of exhibiting the bill, an inhabitant, and notoriously convertant in the county-palatine of Chester, viz. at Nantwich.

Foreign plea must be sworn to, but a plea to the jurisdiction need not.

Which plea the plaintiff apprehending to be a foreign plea, he signed his judgment, because it was not sworn to (a).

S. C. 3. Salk. 173.
S. C. 5. Mod. 335.
S. C. Carth. 402.
3. Will. 51.

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(a) See 4. & 5. Anne, c. 16. l. 11.

K

CHESHYRE

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CHOLMELY
against
BLOOM.

CHESSHIRE moved to set the judgment aside, because it was not a foreign plea; for pleas to the jurisdiction of the court are not such, as pleas of *antient demesne*, privilege, &c. and therefore are never sworn to. But a foreign plea is, where the defendant carries the action out of the county where the plaintiff had laid it. If the action be transitory, there, if the defendant carry it into another county, the plea is naught, except in special cases; but if the action be local, by removing it into another county than where the plaintiff had laid it, it is properly a foreign * plea; which is not done in this case; for here the action is laid in *Cheshire*, and the defendant does not in his plea remove it from thence.

* [124]

Quod Cur. concessit; and the judgment was set aside.

Case 237.

Sheppherd against Taylor.

Distingas is the execution on a judgment in a court baron, and not a *levari*, without particular custom.

ERROR in replevin for taking six pewter dishes. The defendant makes confession, that a judgment was had in a court-baron against the plaintiff, and that a *levari facias* issued out against him; upon which he took the pewter dishes. The plaintiff demurred, and had judgment.

S. C. 3. Salk.
219. 272.
3. Lev. 404.
1. Salk. 107.
5. Com. Dig.
"Pleader"
(3. M. 24.).
1. Will. 316.

And it was now affirmed, because a *distingas* is the execution on a judgment in a court-baron, and not a *levari facias*, without a particular custom alledged, which is not done; and the avowant should not have begun with the judgment first, but have shewn a plaint entered, and *superinde taliter processum fuit*; and so judgment against him.

Case 238.

Earl against Plummer.

The commencement of the statute 29. *Elim.* c. 4. concerning sheriff's poundage.

DEBT BY A SHERIFF, for his fees for executing an *extendi facias* returnable *quinque Pasch.* wherein he declared on a statute made the twenty-ninth of *October*, in the twenty-eighth year of *Queen Elizabeth*. The defendant demurred to the declaration:

S. C. 1. Salk.
332.

FIRST, Because there is no such return as *quinque Pasch.*

Sed non allocatur, because at most it is but an erroneous writ; and if the party himself will take out such an erroneous writ, he shall not, under pretence thereof, cheat the sheriff of his fees.

SECONDLY, Because the session of parliament did not commence on the twenty-ninth of *October*, but on the fifteenth of *February* following.

SED TOTA CURIA *contra*; for as it was now made appear from a copy taken from the parliament rolls, and from 1. *Anderson*, 294, 295, the *teste* of the writs of summons of that parliament were the fifteenth of *September*, in the twenty-eighth year of *Queen Elizabeth*, appointing them to meet the fifteenth of *October* following; and on the eighth of *October* the parliament was prorogued to the twenty-seventh of *October*, and after to the twenty-

Easter Term, 9. Will. 3. In B. R.

twenty-ninth of *October*; and then the parliament was adjourned, but not prorogued until the *February* following.

EARL
against
PLUMMER.

Judgment was given for the plaintiff.

* Fisher *against* Pomfret.

* [125]
Case 239.

PER CURIAM. A bill of exchange payable to a man and his order, or to his order only, is one and the same. S.C. Carth. 403.

Ord *against* Howard.

Case 240.

IF you plead *alien-née* in bar, you must lay a place where he is born; but if in *abatement*, it is triable where the action is pleaded in bar or abatement.

1. Saund. 8. Postea, Trip. 10. Will. 3. Williams v. Drury.

Sir Roger Puleston *against* Sir Peter Warburton.

Case 241.

EJECTMENT on a demise made the tenth of *April* 1697, *habendum* from the twenty-fifth of *March* then last past for five years, by virtue whereof he entered and was possessed, until the defendant, *April* the seventh, entered and ejected him; which declaration was of *Trinity Term* last. Issue not guilty. Verdict for the plaintiff, on a trial in *Michaelmas Term* last.

Ejectment brought on a demise bearing date subsequent to the ejectment not amendable. S. C. 5. Mod. 332. S. C. Salk. 48. S. C. Carth. 401. 1. S. d. 316.

AND IT WAS MOVED *in arrest of judgment*, that it appears in the declaration, that the plaintiff had no cause of action at the time of the action brought.

And it was now moved, that, being a plain mistake of the clerk, it was amendable; but especially in ejectment, which is a creature of the Court, set up to try a title; wherein, according to every day's experience, the defendant is changed, and sometimes the plaintiff, and sometimes the term of the demise is enlarged.

416. Ray. 165. 1. Mod. 250. Comb. 394. 1. Com. Dig. "Amendment" (L. 2.). 1. W. l. 1. 3. Burr. 1290. 2. Bac. Abr. 163. 1. Term Rep. 782.

THE COURT gave judgment that they would have it amended if they could, but they were judges of law and not of equity; and if such amendments should be suffered, great uncertainties would be introduced; that if this were amended, the nature of declarations would be altered, and another Term would be counted on.

And judgment was now stayed.

After which THE COUNSEL of the plaintiff moved, that although they could not have judgment for the recovery of their term, yet they might for their costs and damages, here being an entry and ouster found, which is sufficient to entitle them to that; as if the term expires pending the suit, the plaintiff shall recover his costs and damages, though not his term.

SED PER CURIAM *contra*; that in case of the expiration of a term * pending the writ, the Court shall go on to judgment as to the

* [126]

Easter Term, 9. Will. 3. In B. R.

SIR ROGER
PULSTON
against
SIR PETER
WARRINGTON.

the costs and damages, because it was not the plaintiff's fault that the term expired pending the writ, and his writ is not falsified thereby ; but that it is otherwise in this case, because here is no term at all ; and the reason of damages in ejectment is the turning the tennor out of possession ; and here it appears that he had no possession at all.

Afterwards it was agreed, by consent, that they should amend (a) ; that the judgment be for a security ; that the defendant should take a new declaration ; and that the defendant should deliver possession, if the verdict were against him, and not bring a writ of error.

(a) See Anonymous, 1. Salk. 257. 4. Burr. 2447. Vicars v Heydon, Scrape v. Rhodes, Barnes, 8 Driver Cowp. 841. Church v. Perkins, v. Stratton, Barnes, 17. Oates v. 3. Term Rep. 749. and Mr. Serjeant Shepherd, 2. Stra. 1272. Lee v. Ell's, Runnington's History, Principles, and 9. Black. Rep. 940 Anonymous, Practice of the Legal Remedy by Eject. 6. Mod. 130. Doe v. Pilkington, ment, page 226 to 233.

TRINITY TERM,

The Ninth of William the Third,

IN

The King's Bench.

Sir John Holt, *Knt. Chief Justice.*

Sir Thomas Rokeby, *Knt.*

Sir John Turton, *Knt.*

Sir Samuel Eyre, *Knt.*

Sir Thomas Trevor, *Knt. Attorney General.*

John Hawles, *Esq. Solicitor General.*

} *Justices.*

Lydston against The Mayor and Bailiffs of Exeter. Case 242.

THEY returned a *mandamus*, and there was neither the hand of the mayor, nor the seal of the corporation to it: Return to a mandamus need not be under the hand of the mayor or seal of the corporation. Postea Mich. 11. W. 3. The King v. Borough of Abingdon. — See also 1. Sid. 257. 1. Salk. 192. Skin. 368. Fitzg. 4. 5. Com. Dig. (D. 2.)

And *PER CURIAM*, It is well enough without it. Before the statute of *York* the sheriff need not have set his hand to any return. If the return be false, you may bring your action against the whole body politick for making a false return; and against a particular person for procuring a false return.

don. — See also 1. Sid. 257. 1. Salk. 192. Skin. 368. Fitzg. 4. 5. Com. Dig. (D. 2.)

* *Hodgeson against Segrave.*

* [127]

Case 243.

WRIT OF ERROR on a judgment in the county palatine of *Cheshire*: the plaintiff in error delayed to bring in the record; whereupon the defendant moved for a rule to bring it in, and for the plaintiff to assign his errors, or otherwise that they might return a *nonpross.*

Chancery will grant a writ of execution, on producing a certificate from the king's bench office, that the plaintiff in error out of the county palatine of Cheshire does not bring in the record.

THE COURT said, that their direct way was to take a certificate from the king's bench office, that the record is not come in, and on shewing thereof in chancery, they will have a writ *de executione judicii* of course.

Cafe 244.

West against Cole.

Where on writ of enquiry intire damages are given, and for part of which no damages could be given, that part shall be rejected as surplusage.
S. C. post. 157.

INDEBITATUS ASSUMPSIT, and *quantum meruit* for meat, drink, and lodging; and another *assumpsit* and *quantum meruit*, in the same declaration, for wares sold. Judgment by default. Writ of enquiry, and intire damages given *occasione præmissorum*.

IT WAS MOVED, that judgment should be stayed; because in the second *assumpsit* and *quantum meruit* there is no averment in fact of the value of the wares, and so is void, and for which no damages can be given. A *quantum meruit* for wares sold, without averment *de facto* of the value, is naught; but here being another *assumpsit* well laid, we will suppose all the damages given for that, and reject the other as surplusage.

Cafe 245. Crawley against Blewett and Wolf, Sheriff of Middlesex.

Nonfuit not to be set aside without consent.

ACTION UPON THE CASE for a false return of *nulla bona* upon a *fieri facias*, when there were goods sufficient. The plaintiff declared on a judgment in the common pleas, and on evidence produced a copy of a record, in *Michaelmas Term*, in the eighth year of *William the Third*, wherein was written in the margin "*Cook*," (who is one of the prothonotaries of the common pleas) but there was no "*placit. coram, &c.*" at the top.

For which omission the defendant insisted, that there was no fair copy of a record; that it did not appear who this *Cook* was. That the plaintiff declared of a plea held before *Sir George Treby*, and it did not appear that the record produced by him was such a one.

And of that opinion was *HOLT, Chief Justice*, who tried the cause; * which the plaintiff perceiving was nonsuited.

* [128]

And now the plaintiff moved, that although in strictness he should begin again, yet that being a hard case, the nonsuit might be set aside, and they try it *de novo*.

HOLT, Chief Justice. Formerly, and especially in *TWISDEN's* time, if you had declared that such a one was impleaded in the king's bench *per billam*, and had produced THE PLEA-ROLL, wherein it is entered, that *memorand.* such a one came *et obtulit billam*, this was not adjudged sufficient, unless you had also produced a copy of the bill on the file, for want of which there were frequent nonsuits; though I could never be of that mind; and have on debate ruled a copy of the plea-roll to be a sufficient proof of the bill.

But in this case the defendant would not consent.

Wherefore THE COURT said, they could not do it: when he had, by his voluntary act, put himself out of court, they could not, by their own authority, bring him in again.

The

Trinity Term, 9. Will. 3. In B. R.

The King *against* Melling.

Case 246.

A NEW TRIAL was never granted, after a trial at bar, purely for going against evidence, except once in *King James's* time; but they are often granted for special reason, as misbehaviour of jury, or some other misdemeanor.

But see Stiles, 462. 466. 2. Ld. Ray. 1358. 2. Stra. 1105. 1. Burr. 395. Tidd's Practice, 560. New trial not grantable after trial at bar. S. P. ante, 93. 5. Mod. 348.—

Grafcot *against* Warren.

Case 247.

EJECTMENT AND SPECIAL VERDICT. The case was this: A man possessed of a term devised it to an infant *in ventre sa mere*, if it should be a son; and if it should be a son, and die during his minority, then he devised it to his grandson; after which he died, leaving his wife executrix, and the child was afterwards born, and proved a daughter.

AND IT WAS ADJUDGED, without argument, that the executrix, and not the grandson, should have the term; because the grandson was not to have it but upon a precedent contingency, *viz.* the birth of a son, and his death in his infancy, which condition must be first performed; and it appears plainly, that the intent of the testator was that he should not have it otherwise.

* [129]

* Bacon *against* Debarry.

Case 248.

DEBT ON A BOND conditioned, that the defendant, on behalf of *De Ruiter*, should stand to the award of *C. and M.* of all matters between the defendant, as attorney to *De Ruiter*, on the one part, and the plaintiff on the other, concerning certain accounts between the plaintiff and *De Ruiter*. The defendant pleads no award made. The plaintiff replies, and sets forth an award; which he sets forth to be made *de præmissis*; which was, that the defendant, on behalf of *De Ruiter*, should pay to the plaintiff forty-five pounds six shillings and ten pence, and that afterwards the plaintiff and defendant, on the behalf of *De Ruiter*, should execute mutual releases to each other, *ad usum eorum alterius*, of all actions, matters, &c. concerning those accounts; and assigns a breach in non-payment of the money. The defendant demurs.

AND IT WAS RESOLVED,

FIRST, That the submission of the debt is good; for the defendant puts himself in the place of *De Ruiter*, and is bound to perform the award.

SECONDLY, That this award is a void award, because it is not mutual, but of one part only: for first, the mutual releases are to be made between the plaintiff and defendant, where they ought to have been between the plaintiff and *De Ruiter*, or to be delivered to *Debarry*, for the use of *De Ruiter*; for a release to *Debarry*

Trinity Term, 9. Will. 3. In B. R.

BACON
against
DEBARRY.

can by no means advantage *De Ruiter*: we would, if we could, have construed it to be a release to *Debarry* for *De Ruiter*, but the words "*ad usum alterius eorum*" exclude this construction.

The last time this case was argued, SIR BARTH. SHOWER insisted, that this award was good if there had been no releases at all awarded, as to which there has been some doubt if such award be made *de præmissis*; which this is not. It is pleaded, indeed, and averred to be *de præmissis*, but when the award is set out, that says no such thing. But supposing it to have been made *de præmissis*, yet when he comes and does not rest on that, there is a void thing awarded on the behalf of *De Ruiter*. It is plain that the arbitrators did not rely on the payment of the money to be satisfaction, but on the releases too, which spoils the whole award; and this is grounded on the case of *Capel v. Holland* (a), and on the case of *Hull v. Maffy* (b). If in this case it had been said, that the money should have been paid in satisfaction of all accounts, or * [130] * that they had examined all accounts, and on stating thereof there had appeared so much due to *Bacon*, and that they had awarded the money to have been paid for all accounts, the subsequent matter would not have vitiated it, as in the case of *Burbidge v. Raymond* (c).

Therefore judgment for the defendant.

(a) *Stiles*, 44. *Allen*, 10. 1. Roll. (b) 1. Roll. Abr. 254. Abt. 254. (c) 1. Roll. Abr. 255.

Case 249.

Freeman against Bernard.

An award of mutual releases, and nothing else, is not good. *Postea Mich.* 12. Will. 3. Anonymous acc. Vide 2. Jo. 6. 15.

ASSUMPSIT on the sale of hops. The defendant pleaded submission to arbitrators, who awarded, that each party should release all actions to the other; that he tendered such a release, and was and still is ready to release, and so prays judgment *fi actio*. The plaintiff demurred.

The question was, Whether the defendant's plea was a good bar?

S. C. Comb. 440. S. C. Holt, 79. S. C. Carth. 378. S. C. Salk. 69. S. C. 3. Salk. 45. S. C. 1. Ld. Ray. 247. S. C. Ray. Ent. 368. 1. Mod. 274. 3. Lev. 264. 413. See Kyd on Awards, 137. 243.

HOLT, Chief Justice, delivered the opinion of the Court; and said, There is no question, but if they had awarded a sum of money to be paid, or a horse, or anything in satisfaction, the very awarding of this, though not actually delivered, would have been a good bar. But now in this case there is nothing awarded, but only a way and means mutually to discharge all actions. Now there is a great difference between awarding the doing anything in satisfaction, and the awarding a release of an action; for when a thing is awarded to be done in satisfaction, that raises a new duty in lieu of the old one discharged; as if money be awarded to be paid, debt lies for it; but in the case of a release, there is only a method ordered to discharge the action. If the award itself discharge the action, there needs no release to be given, because action was gone before;

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before ; but the action being not discharged until the release comes, until it comes actually it cannot be a bar.

FREEMAN
against
BERNARD.

Judgment for the plaintiff.

Bennoyer against Brace.

Case 250.

HOLT, Chief Justice. This case stands for the resolution of the Court, on a motion : Trespass against four ; verdict and judgment for the plaintiff against four ; all four bring a writ of error after judgment given ; one of them dies before the record certified, and the plaintiff takes out a *capias ad satisfaciendum* against the survivors ; whereon two questions have been :

Death of one of the plaintiffs in error must be suggested on the roll, before execution can be taken out.

FIRST, Whether, if judgment be had against two * defendants, and one dies, execution may be had against the survivor without a *scire facias* ? Which we hold it may, supposing it to be within the year ; because there is no change of the record at all, and it shall not be intended there was a release to the party deceased.

* [131]
S. C. 1. *Ld. Ray.*
244.
S. C. 5. *Mod.* 338.
3. *C. Salk.* 319.
S. C. *Holt,* 640.
S. C. 8. *Mod.* 108.
S. C. *Comb.* 441.
3. *C. Carth.* 404.
Moor, 367.
Noy, 151.
Carter, 112.
1. *Salk* 264. 319.
5. *Com. Dig.*
" *Pleader*."
(3. *L. 2.*)
4. *Bac. Abr.*
416. 419.

SECONDLY, Whether in this case, when the writ of error abated by the death of one of the plaintiffs in error, execution might be taken out against the rest, without apprising the Court thereof ? By the writ of error the hands of the Court were tied up, so that they ought not to award execution until they are satisfied their hands are loose. Now here is an execution, without making this matter appear to the Court, for which reason it went out erroneously ;

And therefore let a *superfedeas* go *quia emanavit improvidè, &c.*

Prince against Molton.

Case 251.

ACTION ON THE CASE, wherein the plaintiff declared, that on the second of *July*, in the sixth year of *William the Third*, he was possessed of a meadow next adjoining to a river, and to another close contiguous to the said river ; which river, time out of mind, run through his meadow to an antient mill of the defendant's without any overflowing ; that the defendant, on the third of *August*, in the sixth year of *William the Third*, extended and enlarged the foundation of his mill further into the river, whereby he so obstructed the river, and exalted the water, that it overflowed and drowned the plaintiff's meadow, *per quod* he lost the use and profit thereof, from the aforesaid second day of *July* to the time of exhibiting the bill. " Not guilty " pleaded, and verdict for the plaintiff.

Where damages are given for what is impossible, it is ill.
S. C. *Carth.* 386.
S. C. *Comb.* 442.
S. C. 2. *Salk.*
663.
S. C. 1. *Ld.*
Ray. 248.
S. C. *Holt,* 192.
Ante, 127.
2. *Mod.* 154.
Dougl. 696.

IT WAS MOVED in *arrest of judgment*, that intire damages are given to the plaintiff, and from the second of *July* to the third of *August* he had no damages at all, by his own shewing ; and it shall not be intended that the damages given by the jury are only for the time after the third of *August* ; for the damages shall be understood to be given not according to law, but according to the allegation

Trinity Term, 9. Will. 3. In B. R.

PRINCE
against
MOLTON.

allegation of the plaintiff, who lays his damage; as resolved in the case of *Harbin v. Green* (a).

* [132]

And first, ALL THE COURT, except ROKEBY, *Justice*, seemed to think it well enough; for it may be the plaintiff laid up his meadow for grafs from the second of *July*. But afterwards judgment was arrested; for though he might lose the profit from that time, he notwithstanding could not lose the use. If he had not said "*usum*," * they might have given judgment for him. This case is the very same with the case of *Harbin v. Green*.

The judgment was arrested.

(a) Hob. 189. Mcor, 337.

Case 252. The King *against* Jerison and the Inhabitants of Chesterfield.

Boy put out to learn to shave, there being no covenants with him, gains no settlement.

A BOY was put out to a barber for a year to learn to shave, and to make bob-periwigs, according to covenants between the barber and *Sir Paul Jenkinson*, the boy's master; to which covenant the boy was no party.

AND IT WAS ADJUDGED this made no settlement, because it is no service; he being no more than a boarder there for his education, which shall not make a settlement.
S. C. Salk. 479.
S. C. Skin. 671.
S. C. 5. Mod.
323. S. C. Carth. 400. S. C. Comb. 445. Cald. 31.—See all the cases on this subject collected in the 2d vol. of Conitt's Poor Laws, page .

Case 253.

Chickham *against* Dickson.

Prohibition may be after sentence, if it appear on the proceedings that they have not jurisdiction.

S. C. Comb. 448.
1. Roll. Abr. 80.

PER CURIAM. If one be sued in the spiritual court, for an ecclesiastical matter, out of his diocese, it is too late to come after sentence for a prohibition; because the party has affirmed the jurisdiction. So if he be sued for a matter not belonging to ecclesiastical consuance; but if it appear on the proceeding, that they have meddled with a matter which belongs not to them, a prohibition shall go after sentence; but *secus*, where that does not appear on the face of their proceedings (a).

(a) See *Terremoulin v. Sandys*, post. *Pool v. Gardner*, Carth. 463. Post. 143. Comb. 462. Carth. 423. and 206.

Case 254.

Anonymous.

Rule.

HOLT, *Chief Justice*, made this rule be observed for the future, That if a man surrender himself on a judgment given against him, and he be not charged within two Terms after the judgment, he shall be discharged on common bail; but at the same time he must bring a certificate from the clerk of the errors, that there is

no

Trinity Term, 9. Will. 3. In B. R.

no writ of error pending; because otherwise he might, by writ of **Anonymous**, error, close up the hands of the plaintiff, and so take advantage of his own wrong.

Anonymous.

Case 255.

HOLT, *Chief Justice*. When you plead outlawry in abatement, when you put your plea in the office, you must shew a *capias*, or some such matter as may make the outlawry appear; and not conclude only *prout patet per recordum*, as you do when you plead it in bar, and have time to bring in the record.

Outlawry, how
pleaded in bar
and in abate-
ment.

TRINITY

TRINITY TERM,

The Ninth of William the Third,

IN

The Exchequer Chamber.

Sir Edward Ward, *Knt. Chief Baron.*

John Blencowe, *Esq.*

Henry Hatsell, *Esq.*

Robert Tracy, *Esq.*

} *Barons.*

Sir Thomas Trevor, *Knt. Attorney General.*

John Hawles, *Esq. Solicitor General.*

* [133]

Case 256.

* Leaves against Bernard.

Where a suit is commenced by bill, praying judgment of the count is a plea in bar.

S. C. 5. Mod. 231.

4. Bac. Abr. 130.

2. Com. Dig. 90.

CASE on several promises: The defendant *venit et defendit vim et injuriam quando, &c. et petit judicium de narratione et quoddam narr. præd. casset.* The plaintiff joined in demurrer, and had final judgment.

The defendant brought a writ of error, alledging that final judgment ought not to have been, but only a *respondeas ouster* awarded, this plea being only in abatement, and not in bar.

SED PER CURIAM TOTAM, By the course of the court of king's bench, wheresoever you commence *by bill*, a praying judgment of the count is a plea in bar; and in that case, if you plead in abatement of the count, you must not pray judgment of the count, and that the count may be quashed; but you must pray judgment of the bill, and that the bill may be quashed.

The judgment was affirmed.

Case 257.

Roe against Haugh.

S. C. 1. Salk. 29.
S. C. 3. Salk. 14.

B. WAS indebted to A. in the sum of forty-two pounds, and C. in consideration *quoddam A. accipere vellet ipsum C. fore debitorem ipsius A. pro quadraginta duob. lib. eidem A. per B. tunc debet.* in

Trinity Term, 9. Will. 3. In Cam. Scac.

in vice et loco ejusdem B. super se assumpsit, et eidem A. promisit quod ipse C. eisdem quadraginta duas lib. eidem A. solvere vellet. A. dies; his executors, on this promise, bring an assumpsit against C. averring in their count, that A. the testator trusting to the said promise of C. accepit præd. C. fore debitorem ipsius A. without saying anything that he discharged B. Non assumpsit pleaded; verdict and judgment for the plaintiff. Writ of error brought in the exchequer chamber.

Rot
against
Haven.

* [134]

The error insisted on was, that this is a void *assumpsit*, here being no good consideration; for except *B.* was discharged, *C.* could not be chargeable;

For which reason BLENCOWE, POWELL, and WARD were of opinion, judgment should be reversed; but POWIS, NEVILL, LECHMERE, and TREBY, that this being after verdict, they should do what they could to help it; to which end they would not consider it only as a promise on the part of *C.* for as such it would not bind him, except *B.* was discharged; but they would construe it to be a mutual promise, viz. that *C.* promised to *A.* to pay the debt of *B.* and *A.* on the other side promised to discharge *B.* so that though *B.* be not actually discharged, yet if *A.* sues him, he subjects himself to an action for the breach of his promise. Vide 1. Saund. 210, 211. Sur Denur.

The judgment was affirmed.

TRINITY

TRINITY TERM,

The Ninth of William the Third,

IN

The King's Bench.

Sir John Holt, *Knt. Chief Justice.*

Sir Thomas Rokeby, *Knt.*

Sir John Turton, *Knt.*

Sir Samuel Eyre, *Knt.*

} *Justices.*

Sir Thomas Trevor, *Knt. Attorney General.*

John Hawles, *Esq. Solicitor General.*

Case 258.

The King *against* Broom.

By admiralty law, property of a ship taken from an enemy without letters of mart, vests in the King.

S. C. Carth. 398.

S. C. 5. Mod.

340.

S. C. 1. Salk.

32.

S. C. Comb. 444.

2. Salk. 440.

3. Lev. 351.

6. Mod. 15.

4. Mod. 176.

2. Lev. 27.

Ray. 489.

1. Show. 20.

2. Saund. 260.

Dough. 394. 613.

2011.

3. Ter. Rep. 223.

4. Ter. Rep. 385.

BROOM, by authority under THE AFRICAN COMPANY, who, by the king's letters patent, had orders to take the ships of enemies, and dispose them as they pleased, took a French ship on the high sea, and carried it into a river beyond sea, and sold it there. This ship, upon a general monition *contra omnes gentes* fixed upon the *Exchange*, was condemned in THE ADMIRALTY for prize; and the grantee of the perquisites of the admiralty libelled, in the name of the king's advocate, against Broom, reciting the taking and the condemnation; and that it was a perquisite of THE ADMIRALTY; and alledged, that Broom had not delivered the ship on request, but had converted it, &c. And sentence was given against Broom in THE ADMIRALTY, from which he appealed to the Delegates;

And now prayed a *prohibition*, suggesting, that the matter arose *infra corpus com.* and this is a plain action of trover.

But against the prohibition it was objected, that it is after sentence, and to stop his own appeal; and for this cited 1. *Cro.* 69. *Lack.* 253. *Winch.* 8. 2. *Bro.* 34. 12. *Co.* 77. 2. *Roll. Abr.* 319.

But

Trinity Term, 9. Will. 3. In B. R.

But **PER CURIAM**, If a prohibition be not grantable after sentence, they sitting all the Vacation may hasten the sentence, and conclude the parties before the Term; and it is proper for the party to appeal to suspend the sentence until he may be relieved by prohibition; and where in the libel or proceedings it appears that the cause of suit arose on the land, they may be * prohibited at any time.

THE KING
against
Broom.
Postea Mich.
9. Will. 3. Ter.
remoulin v.
Sandys.

* [135]

SECONDLY, It was objected against the prohibition, that this river did not appear to be part of the continent, or of the main sea; and the suggestion, that this is *infra corpus com.* is not proper, because beyond sea there are no such divisions by counties.

Ante, p. 132.
Postea Mich.
10. Will. 3.
Pool v. Gard-
ner.

But this was not regarded by THE COURT; that where the original cause arises on the high sea, THE ADMIRALTY shall hold plea of the entire suit, though other matter subsequent arise on the land. 3. Cro. 685. 2. Saund. 259. 1. Sid. 320.

And it was resolved by THE WHOLE COURT, that though, if goods be taken from an enemy, it vests the property in the party taking them, by our law; yet by the admiralty law, the property of a ship taken without letters of mart, vests in the king upon the taking, and this on the high sea; therefore that which was taken was but in trust for the king, and he who took it is but accountable to him; and for the account, and breach of this trust, the suit is in the admiralty very proper. Now if the party who took this ship, brought it to land, and there sold it, and converted it to his own use, this makes him a wrong-doer *ab initio* (a). And the conversion on the land is but one continued act, with the capture, and is evidence to explain his intent in the capture, to shew his breach of trust on the sea; and as cases very strong in this case were cited, 1. Sid. 320. 367. 2. Saund. 259. Palm. 96. 2. Roll. Rep. 157.

And the rule for prohibition was discharged (b).

- (a) The Six Carpenters' Case, 8. Co. of prize, see Le Caux v. Eden, Dougl. 146. 594. Lord Camden v. Home, 4. Term Rep. 382.—See also Strange, 1078.
(b) As to the exclusive jurisdiction of the court of admiralty upon the question 2. Term Rep. 649.

MICHAELMAS

MICHAELMAS TERM,

The Ninth of William the Third,

I N

The King's Bench.

Sir John Holt, *Knt. Chief Justice.*

Sir Thomas Rokeby, *Knt.*

Sir John Turton, *Knt.*

Sir Samuel Eyre, *Knt.*

} *Justices.*

Sir Thomas Trevor, *Knt. Attorney General.*

John Hawles, *Esq. Solicitor General.*

* [136]

Cafe 259. * The King *against* Sir Richard Raines, Judge of the Prerogative Court.

If a *mandamus* be issued to the prerogative court to grant administration, and it appears that there is a will in litigation, the Court will, on affidavit of the fact, supersede the writ.

S. C. Post. 205.

S. C. Salk. 299.

S. C. Carth. 457.

S. C. 3. Salk.

162. 233.

S. C. Holt, 310.

S. C. 1. Ld. Ray.

361.

S. C. 3. Peer.

Wms. 337.

Fitz. 125.

Strange, 857.

3. Atk. 566.

2. Atk. 126.

1. Bl. Rep. 456.

ONE John Gray died in April last, making two executors, who, on the twentieth of April last, brought the will into court to be proved; where, the will being litigated, process issued to all parties concerned, and among others to Francis Gray, brother to the deceased, who refused to appear, and so was adjudged in contempt; but the others appeared, and the cause was set down for sentence on the twenty-fifth of October, which is Monday next. But the last day of last Term, on a motion of course by the procurement of Francis Gray, a *mandamus*, on suggestion that J. Gray died intestate, was granted to the Judge of the prerogative court, commanding him to grant administration; which writ was returnable this day, the twenty-third of October.

And now NORTHY prayed the writ might be superseded; because it was a surprize to the Court, who would not have granted it if they had been apprised of the matter; for by this means the spiritual court would be ousted of its jurisdiction; for if the Judge return it was litigated before him, that return perhaps might be insufficient, and so a peremptory *mandamus* granted; or, if he return that there was a will made, they would try in an action the validity of the will.

And

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And THE WHOLE COURT gave judgment, that the writ should be superfeded; and especially as this case is, where the party might have litigated it in the spiritual court; where he would not appear, but is in contempt.

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against
SIR RICHARD
RAINES.

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HOLT, *Chief Justice*, added, that supposing they should not supercede * the writ, yet it would not be any advantage to them; for supposing *Sir Richard Raines* should return "that there was a will made," he might go on and prove the will, and in their action on a false return, give the probate in evidence; which probate, as long as it stands in force, shall conclude all others from saying the contrary; to which end he quoted an *Anonymous Case*, adjudged in KEELING's time: An executor brought an action producing his testamentary letters; the defendant pleaded that he was not executor, which, according to *Hansloe's Case*, is triable *per pais*; in the trial whereof, at *Guildhall* before KEELING, the plaintiff gave no other evidence than the probate under seal, which KEELING allowed to be sufficient; and after, on motion here, all the Judges concurred with him; because they having jurisdiction of the cause, it was an undeniable evidence, which should conclude all others from saying the contrary (a).

A *probate* is conclusive evidence of the existence of a will, until it is revoked.

(a) See *Rex v. Vincent*, 1. Stra. 481. Trials, 216, &c. where this point is fully discussed.
Rex v. Rhodes, 2. Stra. 703. and the *Duchess of Kingston's Case*, 11. State

Sir Samuel Grimston *against* Moreley.

Case 260.

MOTION to stay the entry of a judgment, on a verdict against the defendant.

The act of parliament for relief of debtors only extends to protect their persons, and therefore a creditor may take the goods of such a debtor in execution after his discharge.

THE CASE was, The defendant owed the plaintiff rent, and being indebted to several others, he took advantage of the late act of parliament for the relief of debtors; and before the trial, got two thirds in number and value to agree to his composition; notwithstanding a verdict was given against him.

And it was now prayed to stay the entry of the judgment, because *eo instante* that the two thirds signed, the plaintiff was bound; and should the judgment be entered, the defendant would lose the benefit of the act, because judgments are excepted therein.

SED PER CURIAM, The design of the act was only to discharge the body, that it should not be liable to be taken, and was not intended to take away any other security, whereby a man might come by his debt without meddling with his body; now in this case there was an action commenced, the defendant was out on bail, and if the plaintiff can come at the end of his suit without meddling with the defendant's body, we cannot hinder him, at least on motion (a). But if you think you have the law on your side, you may have your *audita querela*; or if he take the body in execution, you may come before a Judge, who will discharge him. But let the plaintiff, if he will, enter his judgment on the verdict.

(a) See *S. P. Spalton and Another v. Moorhouse*, 6. Term Rep. 366.

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L

Trantor

Cafe 261.

* Trantor, or Trantrel, *against* Duggan.

A sequestration will not lie for not answering a bill in equity in the grand sessions, in respect of a person not resident within the jurisdiction. S. C. post. 172. S. C. Comb. 468.

MOTION for a prohibition to the grand sessions of *Radnor*, because on an *English bill* in equity there they had granted a sequestration; whereas by the law of the land, no man ought to be *subpœnaed* to answer an *English bill* in those courts, unless he live and be personally served there, that is within the jurisdiction thereof.

And **THE COURT** were of opinion to grant a prohibition; but ordered them to shew cause the first day of next Term (a).

(a) Cause was shewn in the subsequent Hilary Term, and a *prohibition* granted. S. C. post. 172.

Cafe 262.

Anonymous.

Lands escheated are part of the manor.

PER HOLT, Chief Justice. A tenancy escheated to the lord becomes part of the manor; but if the lord purchase part, it is only holden of the manor, and not part of it; but the rent and services are part.

Cafe 263.

The King *against* Elizabeth Ashly.

Order of sessions need not appear to be made by justices of the division.

MOTION to quash an order of sessions; because it is not said that the justices, by whom the order was made, were of the *division*.

S. C. Salk. 479. S. C. 3. Salk. 258. S. C. Sett. & Rem. 261.

SED PER CURIAM, That is but directory; for there may be no justices of the division. "Division" is not known in our law, but of the counties into hundreds; and by that expression in the statute is meant to go to the next justice.

Cafe 264.

Donford, Attorney of the King's Bench, *against* Ellys.

Trespass will lie for mean profits after recovery in ejectment, tho' writ of error pending.

THE PLAINTIFF recovered in ejectment at *York*; the defendant brought a writ of error, and gave bail according to the statute 16. & 17. *Car.* 2. c. 8.; after which the plaintiff, pending the writ of error, brought trespass for the mean profits.

CHESHYRE prayed the Court would stop this action; for if judgment be affirmed, or the plaintiff in error nonsuited, he is to have his damages on a writ of enquiry, according to the same statute; and if he should recover damages in this action, he would be doubly satisfied.

But **THE COURT** refused to stop the plaintiff, for that it may be the writ of error was brought for delay; and supposing it was not; and the plaintiff recovered in trespass, that recovery might be

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be given in evidence to a jury, on a writ of enquiry, to lessen the damages (a).

DONFORD
against
ELLYS.

(a) See the History, Principles and Practice of the Legal Remedy by Ejectment, by Mr. Serjeant Runnington, 163. 439.

Selby against Russell.

Cafe 265.

DEBT ON A BOND for the performance of an award.

An award should be absolute, without reference to a future examination.

IT WAS INSISTED ON *for the defendant*, that the award was void, because there was no final determination of the matter submitted, but several things seemed to be submitted to a future determination (a).

S. C. Comb. 456.
6. Mod. 232.
Palm. 120.

Of which opinion THE COURT seemed to be;

HOLT, *Chief Justice*, saying, that where matters are submitted, they ought to award all absolutely, without referring to any future examination; and that he knew but one case where arbitrators may refer to a future act, and that is, where they award the payment of such costs as an officer of the court shall tax, which has been allowed.

Sed adjournatur (b).

(a) The award was, *FIRST*, That all suits in law and equity between the parties should cease; *SECONDLY*, That the defendant should pay to the plaintiff five pounds; *THIRDLY*, That if the plaintiff did upon account prove certain articles against the defendant, that then he should pay so much as the plaintiff was damaged thereby; *FOURTHLY*, That if the plaintiff make out, upon oath

before a judge, any disbursements laid out for the defendant, that the defendant should pay them; but that in case the plaintiff do not prove these matters within a certain time limited, then they award general releases.

(b) See Bond v. Garnet, 2. Stra. 1082. Dighton v. Whiting, Lutw. 51. and Kyd on Awards, 144.

The King against Gripe.

Cafe 266.

INFORMATION at common law for wilful and corrupt perjury; which sets forth, that there was a trial in replevin in the court of common pleas between Richard and Cornesford, wherein the plaintiff, to maintain his title, produced two deeds of lease and release, bearing date the fifteenth and sixteenth of July 1681, which were witnessed by Richard Strode, who saw the execution thereof at *Albemarle House*, about the time of the date thereof; and that the defendant being produced as a witness on the part of Cornesford, the defendant swore, that about the middle of July 1681, he was at NEWNHAM, "*quandam domum vocat. NEWNHAM in parochia de PLIMPTON Sanctæ Mariæ, in com. Devon.*" INNUENDO, *ubi revera* the said Mr. Strode, at any time in the said month of July, *non fuit apud NEWNHAM præd.* The defendant was found guilty.

Innuendo may explain the meaning of a word or sentence, but cannot add a new term to the proposition.
S. C. 5. Mod. 343.
S. C. 2. Salk. 513.
S. C. Carth. 421.
S. C. Holt, 535.
S. C. Comb. 459.
S. C. 1. Ld. Ray. 256.
S. C. Comy. Rep. 43.

4. Co. 44. 5. Co. 120. Cro. Eliz. 428. Cro. Jac. 430. 2. Inst. 318. 3. Inst. 230. 9. St. Tr. 682. Sayer, 280. Stra. 1189. 4. Com. Dig. 8vo. 662. Cowp. 672. 1. Term Rep. 66.

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against
GRIEPE.

And UPON MOTION in arrest of judgment, the Court gave their opinions *seriatim*.

EYRE, *Justice*. I shall FIRST consider, whether the words laid to be spoken by the defendant be certain enough, without the *innuendo*, to make them material to the point in issue; and SECONDLY, supposing them not to be so, whether the *innuendo* will help it.

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* FIRST, If a man swear falsely in a thing which is immaterial, it is no corrupt perjury (*a*). It is the injury done to the party, by the false oath, that makes the greatness of the crime. By all the cases (*b*) it appears, that to make perjury, the false oath must be material to the point in issue. If *Strode's* being at *Newnham* will not hinder his being at *Albemarle House*, then there is no contradiction in his evidence; and for aught appears, *Newnham* might be near *Albemarle House*; and if so, then it is not material. The King's Counsel insisted, that though on indictments on the statute, it be necessary the false oath should be material to the point in issue, yet is it not so on indictments at common law; for there, though the oath be immaterial, yet if it be false it is perjury. But I do not understand this distinction, for the statute does not alter the nature of perjury, but only inflicts a greater penalty, disabling a man, on a conviction thereupon, to be a witness; whereas at common law the king may pardon the guilt, and by consequence may wipe away the disability. The *Case of Howell Gwyn* (*c*), and *Parris's Case* (*d*), were indictments at common law.

2. Cro. 326.

SECONDLY, The *innuendo* will not supply it; for it is very unreasonable that when a man's own words will not imply perjury in themselves, that another man's construction should make them amount to it. The case of the manor of *Staverton* is very strong in this matter (*e*). Where there is sufficient matter before to which an *innuendo* may relate, there it may be ascertained thereby; but now in this case there is no precedent matter to which it may relate, so that the *innuendo* is altogether foreign, and imposes a sense on a man's words which he never meant.

TURTON, *Justice*, of the same opinion; and he cited *Palmer*, 535. *Sid.* 118. *Hest.* 97. 2. *Roll. Rep.* 368. and said, that it does not appear to concern the matter in question, or to be material; it had been proper to have asked him what *Newnham* he meant, and so to have brought it to a certainty; but since it is not so, the *innuendo* will not help it; and for that he cited 1. *Roll. Abr.* 83. 2. *Bulst.* 81, 82. 1. *Vent.* 339. *Yelv.* 21. 3. *Bulst.* 150. *Hob.* 45. *Hutt.* 44.

(a) 3. Inst. 164. 167.

(b) 2. Bulst. 150. 11. Co. 115.

1. Cro. 353. Hob. 63. 2. Roll. Rep. 369. Yelv. 121. 2. Roll. Rep. 41.

(c) Stiles, 336.

(d) Yelv. 111.

(e) 3. Cro. 438.

ROBERT,

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ROKEBY, *Justice, accord.* All matters charged in matter of crime ought to be certain; this is a crime concerning a place, but the charge is not certain where the place was.

THE KING
against
GRIFFIN

HOLT, *Chief Justice, accord.* I am persuaded in my conscience that he is guilty of a wilful and corrupt perjury; and if I could, by * any rules of law, have given judgment, I would. In speaking to this matter I shall consider,

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FIRST, The insufficiency of the information, omitting the *innuendo*; and so it is no more than if he had swore *Strode* was at *Newnham* afore said,

SECONDLY, With the *innuendo*,

THIRDLY, I shall consider the assignment of the perjury itself; whether the perjury must not have a particular relation to the *Newnham* mentioned in the *innuendo*.

FIRST, If the *innuendo* had been omitted, it had not been good; for *Newnham* must be understood a vill, hamlet, or place out of a vill. If you will ascertain a vill, you must shew in what county it is, for otherwise it is but an *individuum vagum*, which is so very plain that there needs no authority for it; but however I quote these two, 34. *Hen.* 6. 49. 60. 4. *Hen.* 8. 8. It is true, in some cases the vill must be in that county, by intendment, in which the action is brought; as if trespass be in *Middlesex*, and the place be laid in *Islington* generally, *Islington* shall be intended to be in *Middlesex*; but in collateral matters, as in this case, it is otherwise. All courts must take notice of counties, but not of particular vills; so that if *Newnham* be uncertain, and you assign the perjury at "*Newnham* afore said," it is all uncertain.

SECONDLY, The *innuendo* cannot supply that uncertainty, for the *innuendo* signifies otherwise than is signified by the oath: what he swore does not at all import *Mr. Strode's* being at *Newnham* in *Devonshire*. *Newnham*, by common intendment, is a vill, and the *innuendo* is of a house: no *innuendo* can supply the defect of any certainty that was necessary before; for a bare and naked *innuendo* signifies nothing, unless the words themselves import the same; or there be some certain fact to which it may be applied, or from whence it may be inferred, that the man meant the thing, without the help of an *innuendo*. There is a very good account in 4. *Co.* 17. of the use of an *innuendo*. If the words be actionable, it will serve to explain, and is of the same use as "*præd.*" The case of *Miles v. Jacobs* (a), and the *Anonymous Case*, 3. *Cro.* 428. which is the *King v. Bowls*, the roll whereof I have used, and find it to be according to the Report, and is exactly our case; and there is surely as much certainty required in informations and indictments as in actions on the case (b). It would be extraordinary that a man should not be liable in an action for damages for what he means, and yet be

(a) Hob. 6.

(b) Co. Lit. 303.

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vs
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liable to be convicted on perjury on an information. If *Strode* had brought an action for slandering his title to *Newnham*, and laid it in this * manner, as this information is, it would be naught; but he should say, "that he was seised in fee of a certain house called *Newnham*, in *Plimpton* in the county of *Devon*, and the defendant spoke these words, *Mr. Strode* has no title to *Newnham*, INNUENDO "*Newnham prædictam*," that had been good; for it is a sufficient averment, and will have relation to what was alledged before. Here you would perjure a man, not for what he swore, but for what he meant; and yet an *innuendo* is never put in issue, or anybody put to prove it, for it is but a consequence of a certain matter alledged before. If it had been said, that there was a debate in the common pleas about *Strode's* being at *Newnham*, in *Plimpton* in *Devonshire*, then this information *ubi revera*, &c. had been good; or if it had said, that *Strode*, of *Newnham* in *Plimpton*, &c. was produced as a witness, that *Griepe* had sworn he was at *Newnham*, *ubi revera non fuit apud NEWNHAM præd.* that had been good, because there is something precedent to which it may relate (a). For *innuendo* is no averment but only a relation, and there is nothing for it to relate to.

As to the assignment of perjury, you should have said, "*ubi revera non fuit apud NEWNHAM præd. seu ad aliquem alium locum sive hamletum vocat. NEWNHAM*," then the assignment of the perjury had bore some proportion with his swearing.

Objection. It appears by his swearing that *Newnham* was some place different from *Albemarle House*, and he swore in contradiction to *Strode's* evidence. As to that, I think a false oath any way conducive to the matter in issue; or a guide to the jury, though it be but circumstantial; is perjury; but for anything that appears, this was no contradiction to *Strode's* evidence, for *Albemarle House* and *Newnham* may be near one another. If it be matter that tends to the discovery of truth, though but a circumstance, as that such a one wore a blue coat, whereas he wore a red, it is perjury; but if he tell an impertinent story nothing to the purpose, then it is not so (b). If a man speak to the credit of a witness, which is not directly to the issue, yet if false, that is perjury.

It was further objected, that the *innuendo* shall be rejected as surplusage; but that cannot be, for by the *ubi revera* you have put the case on his not being at *Newnham* in *Plimpton*, &c. and so have made the *innuendo* significant, * and therefore it cannot be left out.

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They objected further, that there was a verdict, but that cannot help; for it is against the rules of law to put a man's intent in issue; and what cannot be proved, or put in issue, the verdict cannot find.

(a) *Snowde v. Snowde*, 1. Roll. Abr. 78. pl. 3. *Allen*, 32.

(b) At a trial, the question was upon money lent, and it being objected, that it was improbable the plaintiff, being a cautious man, should lend such a sum without a note; a witness was produced

to prove that he had lent a greater sum to a person then in court, without a note; which person swore he did not; and upon motion to file an information of perjury against him for the oath, the Court held it reasonable. *Mich. 4. Ann. in B. R.*—
NOTE to former edition.

Then

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Then as to this being an information at common law, there is no reason why that should not be as certain as if it were on a statute: the statute makes no new offence, but only gives a new punishment in those cases to which it extends. Perjury at common law was an infamous fact before any statute made; the first of which is 11. Hen. 7. The punishment by statute is much the same as at common law, but in some instances it varies: by statute, if a man pay twenty pounds he shall not be set in the pillory; but at common law he may, and be fined a greater sum: it is part of the judgment by the statute, that he should be disabled from being a witness, and that the king cannot pardon; but the same certainty is required in both: Therefore let judgment be arrested.

In the case of Rex v. Franklin, Mich. 3. Geo. 3. Lord Chief Justice Raymond said this case was reversed in the house of lords.

Terremoulin against Sandys.

Case 267.

SANDYS was proprietor of a ship called *The Constant Mary*, in the year 1689, and sent her to sea, where she was taken off of *Yarmouth, super altum mare*, by *Dubart a Dunkirker*, who sold her to *Terremoulin*; and after which, the ship being at *Spithead*, *Sandys* seized her by the admiralty process, whereon there was a suit commenced in the admiralty court by *Sandys, in causa proprietatis* against the said ship; and then *Terremoulin* came in *pro interesse suo*, and suggests that the ship was his, and that he had been in possession of her three years last past, and prayed his possession might be restored; whereupon *Sandys* put in his libel, that he was possessed of the said ship divers years until 1689; that then the said ship was forcibly taken away from him, without saying *super altum mare*, and thereupon prayed restitution. *Terremoulin* comes in and replies, that the ship was taken by *Dubart super altum mare*, who sold it to him at *Bergen in Norway*. *Sandys* rejoins, that after the taking, the ship was never condemned prize, and so his property still continued. According to which, after examination of the case, the admiralty gave judgment for *Sandys*; for a capture without condemnation alters not the property by their law; whereupon *Terremoulin* appealed to the Delegates;

Libel did not shew that the capture of a ship was *super altum mare*; the subsequent proceedings did; and the Court divided whether prohibition should go.

S. C. Comb. 462. S. C. Carth. 423.

1. Vent. 308.

Ante p. 135.

And now, against his own appeal, prayed a prohibition.

Ante p. 134.

* *HOLT, Chief Justice*. The libel does not say, that the violent taking away was at sea; and if it was not, what have the admiralty to do with it, and how can it be cured by any subsequent matter? for if the admiralty have not consuance of the original cause, though a civil law question arise, they shall not have jurisdiction; and if they have jurisdiction, and a common-law question arise, yet they shall determine it.

* [144]

Ante p. 135.

1. Vent. 174. 303.

And by *HOLT, Chief Justice*, and *ROKEBY, Justice*, a prohibition should go, because the libel was a bare replevin at common law.

But *TURTON* and *EVRE, Justices*, held otherwise; because it appeared by subsequent allegation, that the capture was *super altum mare*.

And so the rule for a prohibition was discharged,

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Cafe 268.

Sutton *against* Moody.

Property of things *feræ naturæ* is in the owner of the soil, while they are there. **TRESPASS** *quare clausum fregit et ibidem venatus est et cuniculos suos cepit.* Verdict for the plaintiff and intire damages given.

AND MOVED *in arrest of judgment*, that the count was ill; because the owner of the ground has no property in the conies, and therefore cannot be said *suos*; and cited 1. *Cro.* 553.

BUT ON THE OTHER SIDE *it was said*, that precedents were both ways; and cited 1. *Brownl.* 167. *Godb.* 174. *Newton v. Richards.*

And by HOLT, *Chief Justice*, "*Warrenna*" is a property *ratione privilegii*, and then there is a property *ratione soli*, both which properties are local. Now a man may have a warren in another man's ground; as a man may have a warren by grant or prescription in his own ground, after which he may alien the ground, and reserve the liberty of the warren; which liberty *ratione privilegii* destroys, or rather suspends the privilege *ratione soli*; so that the property of the conies is in him that has the warren; whereas otherwise the property of the conies, whether wild or tame, is in the owner of the ground where they are, while they continue there, as much as if he had a warren, the warren making not the conies to be more or less his; the privilege of a warren only giving a man liberty to employ his ground in the keeping of conies, which otherwise he cannot do.

Judgment for the plaintiff (a).

(a) See *Keeble v. Hickeringle*, and agreed for law.—NOTE to former 3. *Salk.* 9. 11. *Mod.* 73. 130. *Holt*, edition. 34. 17. 19. where this case was quoted

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Cafe 269.

* Sutton *against* Moody.

HOLT, *Chief Justice*. When we gave judgment in this case, I mentioned 12. *Hen.* 8. *fo.* 9. which was this; One hunted in a forest and roused a deer therein, and ran him into another man's ground, and the forester made fresh pursuit; and it was held, that in regard the forest was a place of privilege, the forester making fresh pursuit, he may retake the deer in another man's ground. They held also, that if a man start game in his own ground, and hunt it into his neighbour's ground, and there kill it, yet in regard of his first starting and pursuit, the property is still in him; and it may be inferred from that case, that if I start game in one man's ground which is not my own, and hunt it into another man's ground, and there kill it, the property is in me; because the party in whose ground it was started, having no privilege, he cannot come and take it (a). I will also remind you of a case, in *Easter Term*, in the

(a) See the case of *Gundry v. Feltham*, "that a person may justify a trespass in following a fox with bounds

"over the grounds of another, if he does nothing more than is necessary to kill the fox." 1. *Term Rep.* 334.

twenty-

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twenty-third year of *Charles the Second*, *Ashford v. Pollaxfen* (a), in this court: *Trespass quare piscatus est in piscaria*, without saying *separali* or *liberâ*, and *pisces suos cepit*, which after verdict was held well; though in a several piscary, the fish are as much at liberty as game on any common ground.

SUTTON
against
MOORE.

(a) 2. Lev. 227.

Greenhill against Shepherd.

Case 270.

THE COURT. If the defendant plead a plea in abatement, and the plaintiff confess it, the plaintiff thereby saves costs.

If plaintiff confess a plea in abatement, he saves costs.

Greenvell against The Censor of the College of Physicians.

Case 271.

TRESPASS for a false imprisonment. The defendant pleaded *quoddam recordatum existit in scriptis, &c.* that he was convicted *pro malâ praxi* before them, for which they committed him to *Newgate, &c.*

Where a thing is not by law to be shewn in court, *oyer* cannot be demanded of it, or a copy.

AND IT WAS NOW MOVED for the plaintiff, that they might have a sight and a copy of the conviction, for otherwise it would be impossible for them to reply; for seeing they had not pleaded a *profert*, they could not have *oyer*.

S. C. 1. Ld. Ray. 252.
1. Barnes, 250.
Douglass, 460.
Stra. 1034.
1. Term Rep. 149.

HOLT, Chief Justice. We are of opinion, we cannot oblige them so to do; because it would be contrary to all * rule; for where a release or other thing is pleaded, and it is not by law to be shewn in court, there you cannot crave *oyer*, or demand a copy thereof. And this is different from the case of copies of court-roll, or a book of a corporation; for if an issue be to be tried concerning a copyhold, the copyholder shall take copies of the rolls; because he has an interest in the rolls of the manor to make out his title; so of an action of a false return against a corporation, when a man is turned out, the books of the corporation are public things, and concern him, and therefore on a trial he has liberty to take copies. If you think the conviction in this case not justifiable, you may remove it hither by *certiorari*.

* [146]

Postea Pasch.
12. Will. 3. Dr.
Greenville v.
College of Physicians.

Smallcomb against Sir Owen Buckingham, and Mills (late Sheriff of London), and Crosse.

Case 272.

THE CASE was this: One Fox was indebted to the plaintiff, and gave him a judgment; upon which a *feri facias* was taken out, which bore *teste* the thirty-first of January, and was executed; but if he execute the last first, the execution is good; and the party must have his remedy against the sheriff.—S. C. 5. Mod. 376. S. C. 6. Mod. 292. S. C. Comb. 428. S. C. Carth. 419. S. C. 3. Salk. 159. S. C. Holt, 302. S. C. 1. Ld. Ray. 251. S. C. Com. Rep. 35. delivered

The first *feri facias*, delivered to the sheriff, should be first delivered

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SMALLEYON
against
SIR OWEN
BUCKINGHAM,
MILLS, LATE
SHERIFF OF
LONDON, AND
CROSSE.

delivered to the sheriff the day after; who took Fox's goods in execution thereon, and made a bargain and sale of the same, and the bargainee assigned them to the plaintiff; but it happened, that the defendant Crosse took out a *fiery facias* against the same Fox, tested after the plaintiff's, but delivered an hour before his, on which the sheriff took in execution the goods of Fox so bargained and sold, and in the plaintiff's hand, for which he brought trover.

This case was tried at *Guildhall*, and A CASE was made of it, to have the opinion of the Court.

3. Com. Dig.
308.
2. Bac. Abr.
352. 456.
4. Bac. Abr. 460.
10. Viner Abr.
"Execution"
(A.) pl. 18.
11. Viner Abr.
"Execution"
(Q. 2.) pl. 14.
Vin. Abr.
"Time" (A. 3.)
pl. 16.
1. Burt. 16.
4. Term Rep.
412.

AND THEY ALL AGREED, that if there be two *fiery facias*'s, and one be delivered to the sheriff one day, and the other another day, and the sheriff first executes the last *fiery facias*, that the execution is good, and the sale thereupon good; and he who delivered his first must have his remedy against the sheriff, because otherwise the consequence would be mischievous, and the execution of the law would be perilous to buyers; the meaning of binding of the goods by a *fiery facias* being only in relation to the party himself, and not only to the execution of the law: As suppose, before the statute, a man took execution the first day of the Term, and within a week after another took out a second *fiery facias* against the same person, tested a week after, and he that has the first *fiery facias* will keep it in his pocket, and the other goes * and delivers his to the sheriff, and gets it executed, is it any reason that he who had the first shall come and defeat thereby the execution of the second? but if he deliver it to the sheriff, and the sheriff execute the second, and omit the first, then may he have his remedy against the sheriff for the wrong done him. Now here in this case, we doubt not but upon this statute there is a *prius et posterius* in a day; and that if the two *fiery facias*'s are delivered to the sheriff on one day, he has not election, but ought to execute the writ first delivered to him; but if the sheriff does execute the last first, the execution is good, and he who had the first writ must have his remedy against the sheriff, if he has done him any wrong thereby; though we do not think he has done him any in this case, because he who had the first writ never desired any warrant from the sheriff; and it is plain, it was designed purely as a screen to preserve the party from the execution of the second *fiery facias*.

Therefore let the plaintiff have his judgment.

Case 273.

Winter against Lovedurr.

Copyhold lands
are parcel of the
demesnes of the
manor.

EJECTMENT. Special verdict, that the lands in the declaration are customary lands, part of the manor of G; demisable time out of mind by copy of court-roll, for life or lives at the will of the lord, according to the custom of the manor; that George Pawlett, Esq. was seised of the said manor in fee, and had issue

S. C. 2. Salk.

537.

S. C. Comb. 371. S. C. Carth. 427. S. C. 5. Mod. 244 378. S. C. Holt, 414. S. C. 1. Id. Ray. 267. S. C. 1. Freem. 507. S. C. Comy. Rep. 37.

Edward

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Edward Pawlett; that the seventh of *January*, in the ninth year of *James the First*, *George Pawlett*, by deed indented between him and *Elizabeth* his wife on the first part, *Hugh Worth* of the second, and *Dorothy Worth* his daughter on the third part, in consideration of a marriage to be had between *Edward Pawlett* and *Dorothy Worth*, and of a portion to be paid, conveyed the said manor, and divers other lands in *B. and S.* to the use of himself for life; then to *Edward Pawlett* in tail; remainder to him and his own right heirs; with this proviso (whereon the question depends), "that it shall be lawful for the said *George Pawlett*, during his natural life, and after his decease to the said *Elizabeth* his wife, during her life, by their several deeds indented, to demise the said lands, or any part thereof, either in possession for one, two, or three lives, or for the term of thirty years, or for any other term or number of years determinable on one, two, or three lives, or in reversion for one or two lives, or for * the term of thirty years, or for any other * term or number determinable on one or two lives, so as the said demise shall not be made of any *antient demesne* lands parcel of the premises, or of any other lands which for the space of seven years last past have been used as the *demesne lands* of the manor, and so as the *antient rent* be reserved." They find, that the marriage between *Edward* and *Dorothy* took effect; that *Edward Pawlett* had issue four daughters, and no son, viz. *Mary*, *Anne*, *Sarah*, and *Katharine*; that *Mary* married *James Glassbrook*, who are the lessors of the plaintiff. Then they find, that *George Pawlett*, by indenture the twentieth of *March*, in the eleventh year of *Charles the First*, between him and *Robert Blanchflower*, reciting, that *Richard Blanchflower* held the lands in question by copy of court-roll for his own life and the life of *Joan* his wife, granted the same, in consideration of sixty pounds, to *Robert Blanchflower*, from and after the death, forfeiture, or other determination of the estate of *Richard Blanchflower* and *Joan* his wife, for the term of thirty years. They find the marriage-money paid; that at the time of the said demise these lands were copyhold lands, parcel of the said manor of *G.* They find, that there is a capital messuage, and divers acres of land, parcel of that manor, which were always held in *demesne*. Then they find the death of *George Pawlett*, *Elizabeth Pawlett*, *Richard Blanchflower* and *Joan* his wife; that *Robert Blanchflower* entered, and was possessed of these lands, by virtue of which he assigned to the defendant *Lovedurr*; and then conclude specially.

EYRE, Justice. The case is but this: A tenant for life, remainder in tail, of a manor, with power in the tenant in tail of the manor to make leases in reversion for one or two lives, or for the term of thirty years, or any number of years determinable on one or two lives, so that such demise be not of the *antient demesne* lands, rendering the *antient rent*: then the tenant for life makes a lease of a copyhold estate of the said manor for thirty years, to commence after the determination of the estate of two persons, whose lives were then upon it.

Whereupon
against
Lovedurr.

Co. Lit. 54.
1. Lev. 168.

* [148]

Whereupon

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WINTER
against
LOVEDRUE.

Whereupon the general question is, Whether this be a good lease according to the said power? which subdivides itself into two questions.

FIRST, Whether it warrants a lease in reversion for thirty years absolute?

SECONDLY, Admitting it does, Whether this power warrants a lease of copyhold estate?

*[149]

EYRE and TURTON, *Justices*. This power warrants a lease for thirty years absolute, because the words themselves are express, and cannot without force be otherwise * understood; for the leases in reversion are to be "for one or two lives, or for thirty years," "or for any number of years determinable on one or two lives;" which are three distinct limitations, different from each other, and so different from *Finche's Case* (a), the reduplication of the particle "or" making them plainly distinct; and if the second paragraph should be connected with the third, then the particularizing of the thirty years would be to no purpose, because included in the general term of "any number of years."—Then as to THE SECOND QUESTION, we are of opinion, that this power does not warrant the leasing of the copyhold lands, being restrained with the "*ita quod* such demise be not made of the *demesne lands*," because the copyhold lands are part of the *demesne lands* of a manor, the freehold being in the lord, and the copyholders only tenants at will; and therefore if the lord alien his manor, there needs no more attornment of the copyholders than of the tenants at will (b). The lord has as much the demesnes of a copyhold as of that which is in his own hands actually (c). Wherefore by reason of this last point judgment ought to be given for the plaintiff.

ROKEBY, *Justice*. I concur that the lease is not good, but from different premises; for as to the question, Whether copyhold land be included within the *demesne lands*, I agree it to be so; not because copyhold lands are in law within the *demesne lands* of the manor, for in vulgar speech sometimes they are not so, but because to understand them otherwise would contradict the intention of the parties, which without doubt was not to destroy the copyholds, as such leases for years would do.—Then as to THE OTHER QUESTION; An absolute lease for thirty years in reversion is not warranted by this power, because then a better lease might be made in reversion than possession. If leases should be made of copyholds in this manner, the manor would be destroyed, which could never be intended; and all powers ought to be taken strictly, according to the case of *Slocumb v. Hawkins* (d). And therefore judgment for the plaintiff:

(a) 6. Co. 39.

(b) Litt. sect. 553. Co. Lit. 311. a.

(c) Cro. Jac. 559. 4. Co. 26.

(d) Yelv. 222. Cro. Jac. 328.

HOLT,

Michaelmas Term, 9. Will. 3. In B. R.

HOLT, *Chief Justice*. The lease is not good, for the reasons of EYRE and TURTON, *Justices*. Two questions have been made: FIRST, Whether this term be within the power? SECONDLY, Whether these lands be within the exception or qualification of the power? As to the FIRST, I am of opinion, that the term is warranted by the power, which depends on the penning thereof; wherein, by way of explication, it is necessary to take notice * what is meant by a lease in reversion. First, In the largest sense it is taken for any lease for years to commence *in futuro*, or at a day to come, as r. *Inst.* 54. "reversion" being there taken in opposition to "possession." But that is not meant in this case, because then he might make a lease to commence fifty or sixty years hence; and therefore this power must be taken according to the common and second signification of the word, which is a lease to commence from and after the determination of a present interest then in being: as suppose there be a lease for life or years then in being, and a lease for years be granted on the determination of that estate, this is a lease in reversion; but the lease in reversion in this power is not only to be taken in this sense, because it not only extends to a lease for years in reversion, but also to a lease for life in reversion, or a concurrent lease with the estate in being; so that these words "in reversion" have two senses; as to the years it is a future interest, as to the lives a concurrent lease. But now as to the lease, as this power is penned; a lease in reversion for thirty years absolute is good, and is not within the reason of *Finch's Case* (a); nay, there is a distinction in that case which confirms my opinion, and the plain meaning of the words can be no other. The same words are used in the power, both with respect to the leases in possession and reversion; in both which there are three distinct powers perfectly different from each other; and repeating the word "for" wholly disjoins the former and the latter part. *The King v. Lewis* (b) and *Brooker v. Robotham*, cited in that case, are pertinent to this purpose, and prove, that subsequent words shall not control general precedent ones, but that they shall both be construed as general and independent clauses.—But then as to the SECOND POINT; I hold these lands to be within the exception or qualification of the power; for all the *demesne lands* generally are excepted, and without doubt copyhold lands are parcel of the demesnes (c). It would have been unreasonable that the tenant for life should have power to destroy the manor for ever; the meaning here was to have power to make estates, renewing the antient rents. Copyholds needed no such power, because custom enables you to demise them. But it is objected, that if the copyhold lands shall be construed to be exempted, then there is nothing left for the power to work upon; for according to the power, the antient rent must be reserved; and a manor only consists of demesnes and services; and if you pare away the * demesnes by the exception, you have nothing for the power to work upon, because a rent cannot be reserved out of the services. But as to that I answer, there are other lands out of

WINTED
against
LOVEDUNE.

* [150]

* [151]

(a) 6. Co. 39.
(b) 1. Lev. 119.

(c) 1. Co. 46.

which

Michaelmas Term, 9. Will. 3. In B. R.

WINTER
against
LOVEDUNE.

which a rent may be reserved, as the lands in *B. &c.* and even, as to the manor, the power is not wholly void, for he may thereby lose the rents and services, though no rent can be reserved thereout; for where a man reserves a power to make leases of divers lands and tenements, and other things, and there is a qualification in the power which extends not to all comprehended in the power, that part of the power may be executed without pursuing the qualification; so is 2. *Roll. Abr.* 262. A man made a settlement to the use of himself for life, with remainder over, and a power to make leases, reserving so much rent as was reserved two years before the making of this settlement; the man made a lease of lands not demised for twenty years before; and this lease was held good, and to be within the power, and that he might reserve what rent he would; because though the qualification was in general words, yet it could only be applicable to such lands as were demised. On the authority of this case was determined another, in *Hilary Term*, in the twenty-seventh and twenty-eighth year of *Charles the Second*, in *HALE's* time, *Walker v. Walker (a)*: A man made a settlement of lands, and also of tithes, with a *PROVISO* of making leases in possession or reversion of all or every part of the premises, reserving five shillings rent for every acre; he made a lease of the tithes, reserving about five pounds a-year; the question was, Whether this was a good lease of the tithes within the power? and held, that a lease of the tithes was good, without reserving any rent at all, because the general words of the qualification should be restrained so that only to which it was applicable: so in this case, though the qualification cannot operate on a lease of the rents and services, because no rent can be reserved thereout; yet the power itself may operate thereon, and the qualification be extended to those other things to which it is applicable.

Therefore judgment was given for the plaintiff.

(a) 1. Vent. 294. 2. Lev. 130.

* [152]

Case 274.

Turberville against Stamp.

Case for negligently keeping his fire.

S. C. 1. Salk. 13.

S. C. Comb. 459.

S. C. Carth. 425.

S. C. Skin. 681.

S. C. Holt. 9.

S. C. 1. Ld. Ray.

264.

S. C. Ray. Ent.

375.

S. C. Comy. Rep.

32.

1. Com. Dig.

209.

ACTION UPON THE CASE on the custom of the realm, for negligently keeping of his fire; declaring that the plaintiff was possessed of a close of heath; that the defendant possessed of another close next adjoining; and that the defendant * *tam improvidè custodivit ignem suum* in his field, that it burnt the plaintiff's heath in his field. After verdict for the plaintiff,

IT WAS MOVED in arrest of judgment, that such an action on the case lies only for a negligent keeping his fire in his house (b); and that in this case he should have his action specially, if he be damaged, and not count on the general custom for negligence.

TURTON, Justice. There is difference between fire in a man's house and in the fields: in some countries it is a neces-

(a) By 6. Ann. c. 3. no action shall be maintained against any, in whose house or chamber any fire shall accidentally

begin. But this shall not affect any covenant on this subject made between landlord and tenant.

sary

Michaelmas Term, 9. Will. 3. In B. R.

lary part of husbandry to make fire in the ground ; and some unavoidable accident may carry it into a neighbour's ground and do injury there ; and this fire not being so properly in his custody as the fire in his house, I think this is not actionable, as it is laid.

TURBERVILLE
against
STAMP.

But by HOLT, *Chief Justice*, ROKEBY and EYRE, *Justices*, Every man must so use his own as not to injure another. The law is general ; the fire which a man makes in the fields is as much his fire as his fire in his house ; it is made on his ground, with his materials, and by his order ; and he must at his peril take care that it does not, through his neglect, injure his neighbour : if he kindle it at a proper time and place, and the violence of the wind carry it into his neighbour's ground, and prejudice him, this is fit to be given in evidence. But now here it is found to have been by his negligence ; and it is the same as if it had been in his house.

Judgment was given for the plaintiff.

Giles against Hart.

Case 275.

INDEBITATUS ASSUMPSIT and *quantum meruit* for goods sold, wherein a request was laid, both as to time and place. The defendant pleaded *non assumpsit* to all except thirteen pounds, and as to that pleads, that after the time of making the promise, viz. the twenty-second of April, which was before the time of the request alledged, he tendered the said thirteen pounds, which the plaintiff then and there refused to receive ; and that from that day he was always ready to pay the money ; and brings it into court.

Tout temps priſt
cannot be pleaded
after imparlance.

S. C. 2. Salt.
622.
S. C. Comb. 443.
S. C. Carth. 413.
S. C. 3. Salt.
343.
S. C. Holt, 556.
S. C. 1. Ld. Ray.
234.

The plaintiff demurred, alledging, that suppose a tender might be pleaded in bar of an *assumpsit*, yet it is not good, without answering the special request alledged, which is not done in this case.

Ante, 8. 22.
Viner, 307.
Fott. 376.
Sayer, 18.
Clift. 203.
Lutw. 227.
Barnes, 343.
354.
1. H. Bl. Rep.
369.

HOLT, *Chief Justice*. We are all of opinion, that the defendant's plea is ill, because the defendant should plead that he was always ready from the time that the money was due, which he cannot after imparlance. It is not material for the plaintiff to set forth a time of request until he comes to his replication ; and when the defendant says he was always ready, that puts the plaintiff in his replication to shew a special request, and that the defendant did not then pay him, and so the plaintiff must have his damages. The way in debt is, for the defendant in all these cases to plead *tout temps priſt* before imparlance, and pray *judicium de damnis*. And since actions of debt are turned into actions upon the case, it is but reasonable the defendant should still have the same advantages : but then the question is, how he shall plead ; whether in bar of the action, demanding judgment *ſi actio*, or in bar of the damages, praying *judicium de damnis*. Now it is reasonable in debt to pray it in bar of damages, because there the damages are but accessory ; but now in an *assumpsit* damages are the principal ; therefore why should it not be thus pleaded, viz. to confess the damages due, and bring them into court, and pray *judicium de ulterioribus damnis*.

Indeed

• [153]

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GILLES
against
HART.

Indeed nobody hath ventured to plead thus, but have chose rather by motion to bring the money into court; but however the right method be, the defendant in this case has pleaded ill; and therefore

Judgment was given for the plaintiff.

Case 276.

Anonymous.

IF JUDGMENT be given for the defendant in the king's bench, and a writ of error be brought thereon, and judgment reversed in the exchequer-chamber; the exchequer-chamber must give the interlocutory judgment *quod quer. recuperet*, and this Court award the writ of enquiry of damages; and so is the case of *Faldo v. Ridge* (a).

Cro. Eliz. 306. Salk. 262. 401. 2. Saund. 256. Strz. 971. 4. Mod. 125. 1. Ld. Ray. 6. Buttr. 2156. 2490. Dougl. 350. 752.

(a) Yelv. 74. Ctb. Jac. 206.

Case 277. Ashton against Sherman and his Wife, Administrators of Field.

PLEADING six DEBT ON A BOND OF THE INTTESTATE'S. The defendants judgments confessed assets for above five; and if the plaintiff in his replication conclude to the country, it is ill.

* [154] The plaintiff replies severally to every of the said judgments, and as to six of them pleaded they were kept on foot *per fraudem*, and as to the two judgments of *Wareing* and *Axtell*, that the defendants had assets to satisfy him, besides goods to satisfy *Wareing* and *Axtell*, *de separalibus debitis et damnis suis prædictis versus ipsos JOHANNEM SHERMAN et MARIAM uxorem ejus, sicut præfertur, recuperat. ; et hoc petit quod inquiretur. per patriam*. Whereupon the defendant demurred specially, because the replication was double. The plaintiff joined in demurrer (a).

HOLT, Chief Justice, delivered the opinion of the Court, and said, in this the defendant executor has pleaded in bar several judgments; the plaintiff has replied to them severally, which he may well do, for he may at his election reply to one, some, or all. But then the plaintiff has not done well in this; he has pleaded to some judgments that they were kept on foot by fraud; and as to the other, that he has assets *ultra*; *et hoc petit quod inquiretur per patriam*; and concluding to the country is naught, because the defendant has confessed by his plea already that he has assets *ultra* those judgments: as for instance; a man pleads three judgments, the plaintiff replies as to two that they are kept on foot by fraud;

(a) See the pleadings in Lilly's Entries, 158. under the same title as this case.

Michaelmas Term, 9. Will. 3. In B. R.

as to the third, that the defendant has assets *ultra*; *et hoc petit quod inquiratur per patriam*. In this case, first, saying assets *ultra* is not good, because it is only an allegation of that which he has already confessed; for by pleading three judgments he confesses assets above two; and then driving him on to an issue is ill: for the same reason therefore you should have omitted the assets *ultra*, and the conclusion to the country, and relied on the other judgments, that they were kept on foot by fraud; or you should have said generally "assets *ultra*; *et hoc paratus est verificare*." It might have been rejected as surplusage; but here you have driven them to an ill issue, which cannot be good. But because the precedents have been this way, as in the case of *Hancock v. Proud (a)*, we will give the plaintiff leave to discontinue, paying costs.

ASHTON
against
SHERMAN
AND HIS WIFE,
ADMINISTRATORS OF
FIELD.

After which, by consent of parties, a rule was given that the plaintiff should have leave to amend, paying costs.

(a) 1. Saund. 336.

The King *against* Lambert.

Case 278.

MOTION was made last Term for filing an information against *Lambert* for subornation of perjury, on an affidavit of his having suborned two persons; but the rule was drawn up generally, and an information was filed for suborning those two, and ten others.

Every subornation of perjury is a distinct offence.

It was moved, that this information was not duly filed, because the addition of ten more were ten more informations.

And **THE COURT** declared, that no information should have been filed, but as to those persons mentioned in the affidavits; every * subornation is a distinct offence; and the act for information does * not direct an affidavit; yet the Court being trusted with it, and the parliament reposing in them, they ought to do it on good grounds.

[155]

THEN IT WAS MOVED, that the information was ill as to those persons, because the statute requires a *recognizance* to be entered into to the party, which they had not done.

Information filed without recognizance entered into by the party is ill; but the Court cannot take it off the file.

To which also **THE COURT** agreed.

But a doubt arose, what should be done with this information which is now filed.

HOLT, Chief Justice, said, it could not be quashed or taken off the file; for when once a thing is on the file, it cannot be taken off without an act of parliament; no, not by consent of parties; as in the case of *Dr. Widdrington* on a *mandamus (a)*: The College made a very scandalous return, and which he and the College agreed; and then they moved to take the return off the file; but **THE COURT** refused it, saying, it could not be done without an act of parliament, only they ordered a *vacat* to be entered thereupon. That in this case the method may be to enter the irregularity on the roll with a *cessat processus superinde*.

Sed Curiam advizare vult.

(a) 1. Keb. 2. 50. 61. 68. 79. 131. 12. & 13 Will. 3. Rex v. Sir Hugh
150. 234. 438. 1. Lev. 23. 1. Sid. 71. Everard.
Ray. 31. 68.—See also post. Hilary Term

Michaelmas Term, 9. Will. 3. In B. R.

Cafe 279.

Brown against Burlace.

Temple no privileged place.

S. C. Skin. 684.

S. C. 3. Salk.

45. 235.

Post. 166.

CASE for rescuing *Burlace*, who was arrested by the sheriff of London's officers in the *Middle Temple*.

It was moved, that the *inns of courts* were privileged, as appears from *Dugdale (a)*, and because that *the Temple* is out of the city of London, as may be seen by *Stow's Survey*.

But *per HOLT, Chief Justice*, Though *the Temple* be, not within the city of London, yet it is within the county of London, as appears, for that all felonies committed in *the Temple* are tried in *the Old Bailey*; and every place in England must be within some county. Places may be extraparochial, but not out of county. Formerly *Black Fryars* was not within the franchise of the city, yet it is and always was within the county of London. Bailiffs indeed should not come in to disturb people when they come to their Counsel, or to enter into chambers to the disturbance of study, or danger of papers and evidences that are frequently in Counsel's hands; but then the way is to submit to the process of law, and to apply to the Judges, who will redress abuses of that kind, by laying bailiffs by the heels; but there is no pretence to extend this privilege to shelter ill people, as in this case: *Burlace* came from * *Gray's-Inn*, but had no certificate from the treasurer, as should be in all cases of removal. Besides, no exemption is good, without setting up a jurisdiction to do justice.

* [156]

1. Jo. 271.

Let the defendant find special bail (*b*).

(a) *Dugdale Orig. Jur.* 317. 320. 322. (b) See 8. & 9. *Will.* 3. c. 27. l. 15.

Cafe 280.

Evans against Martell.

The property is consigned by the bill of lading, and not by the invoice.

S. C. 3. Salk.

290.

S. C. 1. Ld. Ray.

271.

ACTION against the part owners of a ship called "*The Upton Galley*," tried at *Guildhall*. Verdict for the plaintiff; and this point was saved to the defendants:

One *Harvey* loaded the goods for which the plaintiff brought his action, and consigned them to the plaintiff by a bill of lading, but the goods appeared, by the invoices, to be *Harvey's*.

The question was, Whether *Harvey* or *Evans* should bring the action?

And THE COURT was of opinion, that the invoices signified nothing, but that the consignment in a bill of lading gives the property, except where it is for the account of another; so that if a bill of lading be made to *A*. *A*. has thereby an ownership to maintain an action; but if it be to *A*. for the account of *B*. then *A*. is only *B*'s factor, and *B*. has the ownership, and must bring the

Michaelmas Term, 9. Will. 3. In B. R.

the action ; and in this case the action is well brought by the plaintiff (a).

EVANS
against
MARTELL.

(a) See the case of Knight v. Hop- 357. Wright v. Campbell, 4. Burr.
per, Holt, 8. Godfrey v. Fuzo, 2046. Jordan v. James, 5. Burr.
3. Peer Wms. 186. Snee v. Prescott, 2680. Solomon v. Nissen, 2. Term
1. Atk 245. D'Aguillar v. Lambert, Rep. 674. Kinlock v. Craig, 3. Term
Amb. 399. Lickbarow v. Maſon, Rep. 119. 783.
2. Term Rep. 63. 1. H. Bl. Rep.

The King against Harrifon and Duke.

Caſe 281.

THE DEFENDANTS were convicted and outlawed on an information of perjury, and the exigent filed.

Judgment for a corporal puniſh-
ment not to be
given in the ab-
ſence of the par-
ty.

It was moved, that the Court would pronounce judgment on the defendants, ſeeing the proſecutor could go no further.

S. C. 1. Ld. Ray.
267.
S. C. Skin. 684.
S. C. Comb. 447.
S. C. Holk. 399.
S. C. 1. Salk. 400.
4. Hawk. ch. 48.
f. 17.

But THE COURT ſaid, they never knew any judgment given for a corporal puniſhment, even in the caſe of an outlawry, in the abſence of the party. When a man is outlawed for felony, there is never any award of execution againſt him until he is brought to the Bar ; and ſince in this caſe a corporal puniſhment would be part of the ſentence, they could not do it : and upon ſearch SIR SAM. ASHREE could find no ſuch precedent.

Vide Keyl. Rep.
Mauſbridge's
Caſe, ante, 142,
143.

* Weſt againſt Cole.

* [157]
Caſe 282.

THE PLAINTIFF counted, that the defendant, on the fixth of May 1695, in conſideration that the plaintiff had provided him diet for the ſpace of one hundred and twenty weeks *tunc præterit*. promiſed to pay him ſeven ſhillings *per* week ; and that the defendant *poſtea, ſcil.* on the fixth of May 1695, in conſideration that the plaintiff had found him diet for the ſpace of one hundred and twenty weeks *tunc præterit*. promiſed to pay the plaintiff *tantum quantum mereret* for the ſaid weeks.

Where two pro-
miſes are laid,
one well, the o-
ther ill ; that
which is ill laid
ſhall not vitiate
what is well
laid, unleſs it
appear to be for
the ſame thing.

AND IT WAS MOVED *in arreſt of judgment*, that the defendant ſhould be twice charged for the ſame thing, the one hundred and twenty weeks in the *quantum meruit* being not ſaid to be others from thoſe in the ſpecial promiſe, as it is uſually ſaid in thoſe caſes.

S. C. ante, 287.

But THE COURT held, that though "*aliis*" be generally ſaid, yet ſeeing it did not appear they were the ſame, for there is no precise time laid when theſe one hundred and twenty weeks were, they will not intend them ſo as to deſtroy a promiſe otherwiſe well laid.

And therefore the plaintiff had judgment.

Cafe 283.

L'Isle against Armstrong.

If a man be indicted of murder, and found guilty of manslaughter, appeal will lie the same sessions; and if by default of the court he has not his clergy, it shall not prejudice him.

S. C. ante, 108.

S. C. 1 Kely.

89. 93.

S. C. Trem. 20.

S. C. Skin. 670.

S. C. Carth. 394.

S. C. Comb. 410.

S. C. Salk. 60.

S. C. Holt, 63.

4. Co. 40.

Cromp. 101.

Cro. Jac. 282.

* [158]

Yelv. 204.

2. Leon 160.

Salk. 63.

2. Hale, 250.

3. Mod. 156.

APPEAL OF DEATH by L'Isle, as brother and heir, brought by bill at Carlisle, and removed into this court by *certiorari*. The defendant pleaded, that the same session of gaol delivery at Carlisle wherein this appeal was commenced, he was tried for the same cause on an indictment of murder, and found guilty of manslaughter; and thereon prayed the benefit of his clergy, which was refused him there; and the record was removed into this court, where he had his clergy in Hilary Term last, before the plaintiff prayed he should plead to the appeal. The plaintiff replied, that when this appeal was brought at Carlisle, as appears by the record of this court, he requested the appellee to plead, but that he refused so to do.

HOLT, Chief Justice. "*Autresfois convict*" or "*autresfois acquit*" on an indictment was a bar at common law to an appeal, because no man's life should be endangered twice for the same offence; and the Judges proceeding first on the appeal was merely discretionary, the very preamble of 3. Hen. 7. c. 1. saying, that it was only an usage among them so to do; which statute obliges the Judges to proceed within the year and day to hear and determine the indictment, and not to stay on the account of an appeal; without saying, "to be brought," or "already brought," or whether of both. But, say you, Shall he not then answer to the appeal? Yes certainly, the same sessions. If he plead "not guilty," the Judges may proceed and try him *de novo*, and hang him on the appeal. If he plead *autresfois convict*, it is no bar: if he will not answer over, his standing mute must be recorded, and judgment given accordingly, either to be hanged by *nil dicit*, or the *peine forte et dure*. But if you are not ready, and cannot go on with your appeal, I am afraid your appeal will be gone. Neither an acquittal nor an attainder upon an indictment shall be a bar to an appeal, as it was at common law, but only the having clergy, which has been extended so far, that if a man pray his clergy, and the Court do not give it him, he having done what lies in his power, the delay of the Court shall not prejudice him. Now in this case there is no prayer made to have his clergy; but, How comes that to pass? Why, the party was never asked; and if the Court will not proceed to judgment, and call him down to judgment, he has no opportunity to ask his clergy; and therefore I think it a good plea in bar (a). Of this opinion were the other three Justices; and so the appellee was discharged.

(a) See the case of Smith Widow v. Taylor, 5. Burr. 2801. determined on the authority of this case: and it seems to be fully settled by this case, that a conviction of manslaughter on an indictment of murder, and the prayer of clergy

thereupon may now be pleaded in bar of an appeal of the same death, whether such prayer were made upon the party being called to judgment, or not.—4. Hawk. P. C. 7th edit. ch. 36. f. 14.

Anonymous.

Michaelmas Term, 9. Will. 3. In B. R.

Anonymous.

Case 284.

HOLT, Chief Justice. You have four days after **THE POSTEA** is actually returned to move in arrest of judgment.

Anonymous.

Case 285.

PER CURIAM. No motion for a new trial, or to set aside a New trial writ of inquiry of damages, after motion in arrest of judgment (a).

(a) The motion for a new trial must be made within four days exclusive, after the entry of a rule for judgment, Dougl. 171. and if not made within that time, the party complaining cannot afterwards be heard on the subject of a new trial, 5. Term Rep. 436. ; but in criminal cases, where the Court have seen of themselves, or it has appeared to them on the suggestion of Counsel, that substantial justice has not been done, they

will interpose, after the regular time, and grant a new trial, *Rex v. Holt*, 5. Term Rep. 436. And the General Rule, that the party shall not move for a new trial after he has moved in arrest of judgment, 2. Salk. 647. 1. Burr. 334, extends only to cases where the party has knowledge of the fact at the time of moving in arrest of judgment, Bull, N. P. 325. Tidd's Practice, 609.

Anonymous.

Case 286.

IF AN AWARD be made by rule of Court, and the party who refuses to obey the award absconds, so that he cannot be found on a week-day, a service thereof on a *Sunday* is sufficient to bring him into contempt, whereon to have an attachment (a).

Notice of an award on a *Sunday* is good, if the party cannot otherwise be served.

(a) See *Whitchurch's Case*, 1. Atk. 55. But the party cannot be apprehended on the attachment on a *Sunday*, Cowp. 136. 1. Term Rep. 266.

HILARY TERM,

The Ninth of William the Third,

IN

The King's Bench.

Sir John Holt, *Knt. Chief Justice.*

Sir Thomas Rokeby, *Knt.*

Sir John Turton, *Knt.*

Sir Samuel Eyre, *Knt.*

} *Justices.*

Sir Thomas Trevor, *Knt. Attorney General.*

John Hawles, *Esq. Solicitor General.*

* [159]

Calc. 287.

* Meggott, Assignee of Commissioners of Bankrupts of
Watson, *against* Mills and Waine.

An inn-keeper
may be a bank-
rupt.

IT was said by HOLT, *Chief Justice*, and not denied by THE
COURT, that an inn-keeper cannot be a bankrupt, but that a
viſtualler may (a).

A commission of bankruptcy may be taken out against a person who had left off trade, on a debt contracted while in trade. And if a man contract debt while he is a dealer, and afterwards leave off his trade, and then commit an act of bankruptcy, there none of his creditors, becoming so since the leaving off of his trade, can sue out a commission of bankruptcy; but if those who were his creditors before his leaving off his trade, sue out such a commission, the other creditors may come in and join (b).

S. C. 1. Ld.
Ray. 286.

In this case there being some disagreement about the fact, it was ordered to be tried again.

(a) March, 34. Cro. Car. 395. W. Jones, 437. 3. Mod. 327. 1. Show. 268. 3. Lev. 309. Carth. 149. Comb. 281. Salk. 109. 2. Will. 382. Burr. 2064. 1. Term Rep. 572. 1. Brown C. C. 177. (b) 1. Vent. 5. 3. Mod. 329. 1. Show. 268. Dougl. 282. Cooke's B. L. 17.

Jones

Jones against Morley.

Case 283.

4 Jac. Roll. 76.

EJECTMENT of the manor of *Fransham*; special verdict: Where conveyance enures by way of transmutation of possession, the uses may be declared, without deed, else not. * [160]

Anne Bowyer was seised in fee of the lands in question, and being so seised, by indenture of lease and release dated the twenty-second and twenty-third of *July* 1664, reciting a marriage intended to be had between *Edward Morley* and herself; and in consideration that *Edward Morley* had agreed to settle on her, for a jointure, so much of the manor of *Barnbam*, and other his estate in *Suffex*, as should amount to the clear yearly value of three hundred pounds *per annum*, at the time of the settlement, during her life, grants *Fransham* to *Sir William Morley*, and to *J. N.* in fee, to the use of herself in fee, till marriage * and such settlement made; then to the use of *Edward Morley* in fee. The jury find that the marriage took effect, and that after the marriage another indenture, on the twenty-ninth of *January*, in the seventeenth year of *Charles the Second*, was made between *Edward* and *Anne* his wife of one part, and *Jones* and *Trusler* on the other part; reciting therein, that a fine was already acknowledged, and agreed to be levied next *Hilary Term*, to be to the use of *Edward Morley* in fee; and that two days after, *viz.* the thirty-first of *January*, by another indenture between *Edward Morley* of one part, and *Anne* his wife on the other, they covenant to revoke, annul, and make void all contracts and agreements between them, or any other for them, till the marriage covenant should be performed. The jury find a fine was levied *Ostabis Purificationis* 17. & 18. *Car.* 2. 1665; that the three hundred pounds a-year was never settled, but that two hundred and fifty pounds a-year was, charged with a rent of fifteen pounds; that the two hundred and fifty pounds was in part of her jointure; that on the ninth of *July*, in the eighteenth year of *Charles the Second*, *Edward Morley*, by lease and release, did mortgage to *Doble* the lands in *Fransham* in fee for six hundred and thirty pounds; that in the nineteenth year of *Charles the Second*, *Edward Morley* died, and his wife *Anne* surviving entered into the two hundred and fifty pounds *per annum*, and enjoyed it during her life; that *Doble* assigned his mortgage to one, in whose right the defendant claims, as also as heir to *Edward Morley*; that *Anne* died, and that the lessor of the plaintiff claimed as her heir.

HOLT, *Chief Justice*, delivered the opinion of the Court, and said, the general question in this case was, Whether the fine levied *Ostabis Purificationis* 1695, were to the use of the husband and his heirs, or of the wife and her heirs? And we are all of opinion, that the fine was not guided by the deed of the twenty-ninth of *January*, but controuled by the writing between husband and wife of the thirty-first of *January*. I shall premise three things to be taken as granted.

FIRST, If there be a deed to levy a fine to such and such uses, at such a time to such persons, and in pursuance thereof a fine is levied

Hilary Term, 9. Will. 3. In B. R.

JONES
against
MORLEY.

levied to the same persons, and at the same time, the fine shall not be averred to be to other uses by any parol averment, or writing, which is not a deed, but by a subsequent deed it may; but if the fine varies in any circumstances from the deed, the parties are at liberty to aver that the fine was to other uses different from the deed; and so is *Lord Cromwell's Case* (a), and the *Earl of Rutland's Case* (b).

* [161]

SECONDLY, Though the fine vary from the deed, and be levied at another time, or to other persons, yet if nothing appear * to the contrary, this fine shall, by construction of law, enure to the uses contained in the deed.

THIRDLY, If this fine had been levied according to the deed of the twenty-ninth of *January*, the uses thereof could not have been controuled by the writing of the thirty-first of *January*; for though the deed of a *feme covert* could not be binding, yet being relative to a fine it gives an efficacy and operation to the deed, and is as conclusive as if she were a *feme sole*.

Having premised these things, I say this fine is not to the use of the deed of the twenty-ninth of *January*, but is controuled by the writing of the thirty-first of *January*. And first, this fine varies from the fine agreed on to be levied by the deed of the twenty-ninth of *January*, for that fine was not to be levied the same *Hilary Term* as this was, but the next *Hilary Term*, which was *Hilary* twelvemonth, and so this fine was levied before the time in the deed; and thus varying from it, leaves room for an averment that it was levied to other uses. There is a difference between a fine varying from the precedent deed, and a subsequent deed declaring the uses of a precedent fine or recovery, viz. that in the latter, though all strangers might, before the statute 29. *Car.* 2. c. 3. of Frauds and Perjuries, have been let in to aver a parol agreement, prior to a subsequent deed, yet the conusor, or recoveror, or his heirs at law, cannot aver against a subsequent deed, that the fine or recovery was to other uses than those contained in the deed, they being estopped by the deed; but if the deed be precedent, and the fine and recovery vary therefrom, no parties are estopped. Now as this fine varies from the deed, and thereby lets in an averment, so here is an express declaration of a use, by the writing of the thirty-first of *January*, that the fine should be to other uses; and it was reasonable she should be satisfied that her husband would make a reasonable provision for her, and therefore might expect such a declaration as this; and this new agreement was sufficient to declare the use of the fine. There are several ways in the law for declaring of uses, whether upon transmutation of possession, or without it. If an use be declared to be on transmutation of possession, as in a fine or feoffment, there needs no agreement what-

(a) 2. Co. 69. S. C. Jenk. 252.
S. C. 2. And. 69. S. C. Moor, 471.
S. C. Sackvill, 115. Co. Lit. 103.

(b) 5. Co.

soever;

Hilary Term, 9. Will. 3. In B. R.

foever; it is sufficient for the party on the transmutation to declare, that the use shall be to such party, and of such an estate; but if an use arise without transmutation of possession, the use then does not arise by virtue of any declaration or appointment, but there must be some precedent obligation to oblige the party declaring the use, which * must be founded on some consideration; for a use, having its foundation generally on grounds of equity, could not be relieved in chancery, without transmutation of possession, or an agreement founded on a consideration: and therefore if bargain and sale were made of a man's lands on the payment of money, the use would have raised, without deed, by parol. But if the use was in consideration of blood, then it could not arise by parol agreement, without a deed; because that agreement was not an obliging agreement, it wanted a consideration; and therefore to make it an obliging agreement, there was a necessity of a deed: but where there was a transmutation of possession, there needed no deed, but only the bare appointment of the party. Now in this case there was a transmutation of possession; and this writing of the husband and wife of the thirty-first of *January*, though it be no deed, yet it sufficiently shews the intention of the wife, and so is a good original declaration of the uses of this fine. So the next thing to be considered is, whether the writing of the thirty-first of *January* is sufficient to declare the use of the fine; or if it be not sufficient, whether it will controul the deed of the twenty-ninth of *January*.—FIRST, I hold it is a sufficient writing to declare the uses of the fine. Now it is not necessary in declaring a use, if there be a transmutation of possession, to use the very word *use*. Any expression, whereby the mind of the party may be known that such a one shall have the land, is sufficient. We all know the nature of a use, that it was a mere equitable interest; the estate in law was in one, and the benefit and advantage of the estate in another. Uses are indeed strange things in their nature, and of new invention in the law. The original of them was to avoid the statute of Mortmain, *Brent's Case (a)*; for when those statutes prohibited the conveying estates to the clergy, they found out this way to have the estate conveyed to lay persons, under secret trusts, to their use, which in those days affected the conscience of the people; and until the time of *Henry the Eighth* clergymen sat in chancery; who, having power over men's consciences, enforced them to perform those uses. Indeed for a time uses were kept secret, and did not much appear until the differences between the Houses of *York* and *Lancaster*; wherein the whole nation being engaged, both parties finding those uses convenient, and fit to preserve their estates, agreed to support them; so that in *Edward the Fourth's* time we find more mention of them than before; and they * being thus brought in by a general consent, were afterwards licked into form; so that at length, if a man for money aliened and granted his land to one and his heirs, by this a use was raised by

JONES
against
MOALEY.

* [162]

* [163]

(*) 2. LEON. 14.

construction,

Hilary Term, 9. Will. 3. In B. R.

Jones.
against
Mortimer.

construction, and it amounted to a bargain and sale, and so is *Rex's Case* (a). Now in this case here is an agreement between the husband and wife, which though void as to an agreement, yet is good to declare a use. As suppose a man at this day make a bargain and sale, and the deed is not inrolled, or make a charter of feoffment, and there is no livery, yet they will be sufficient to declare the use of a fine afterwards levied between the same parties. But suppose this be not a sufficient declaration of the use of a fine, yet it will be sufficient to controul the deed of the twenty-ninth of January; for thereby it is expressly declared, that all writings, agreements and assurances, and deeds whatsoever, different from the agreement in the marriage, shall be revoked and annulled: so that taking it in this sense, to controul and hinder the rising of a use according to the deed of the twenty-ninth of January, no use can rise to the husband; but the estate being the wife's, the use must, by operation of law, be to the wife and her heirs; and if so, then the lessor of the plaintiff has a good title.

Judgment was given for the plaintiff; and affirmed in the house of lords.

(a) 8. Co. 94. a.

Case 289.

Broadwaite against Blackerby and Perkins.

Bill cannot be
filed against an
attorney in Va-
cation.

S. C. 1. Salk.
344.

MOVED by NORTHEY, that the defendants might not be obliged to plead, because one of them was an attorney, and the bill was filed against him in the Vacation, whereas it should be in Term time, for you must declare against him as present in court.

To which THE COURT agreed.

MR. ASHTON and SIR SAMUEL ASHTREE certified the practice to be so, and that it was never used to file a bill in Vacation; for to be a bill of a subsequent Term, the bill must be filed *sedente Curia*, the last day of the Term; for it is too late after the Court is up.

HOLT, *Chief Justice*. If filed in Vacation it cannot be a bill of a precedent Term, for that is past, and the other not come (a).

In what case an
attorney may be
declared against
in *custodia*.—Comb.

And then HOLT, *Chief Justice*, mentioned another fault, that in this case a bill should not have been filed against him, but he

(a) See *Holloway v. Croft*, cited 2. Burr. 1052.—But in the case of *Lane v. Wheat*, Mich. 23. Geo. 3. it was determined, that a bill may be filed against an attorney in Vacation, to prevent the statute of Limitations from attaching, Dougl. 773. And Mr. Justice BULLER says, the doctrine "that a bill filed in

"Vacation cannot be referred either to the precedent or subsequent Term," cannot be supported; for if that were true, no proceedings could go on out of Term: And it seems now decided, that a bill may be filed against an attorney in the Vacation in all cases, *Waghorne v. Field*, 5. Term Rep. 173, 174.

should

Hilary Term, 9. Will. 3. In B. R.

should have been declared against as *in custodia*; for when you proceed jointly against a privileged person and one not privileged, you must declare against them all *in custodia*, for in a joint action the privilege* is lost; as in the common pleas, if you have an action there against an attorney and another, you must take out an original against both:

BROADWAITE
against
BLACKBERRY
AND PFANNING.
[164]

And SIR SAMUEL ASHTREE certified, that it was never done, nor could be done, to declare against one in custody and the other present.

So THE COURT gave them leave to strike out what they would; so they did not add anything, and said, that if the bill be irregularly filed, it may be taken off of the file.

Et adjournatur.

Anonymous.

Case 290.

UPON A MOTION for an attachment for not returning a *man-damus*;

Attachment in
chancery on an
alias and *pluries*
is returnable in
B. R. and is an
action on which
damages shall be
recovered.

It was said by HOLT, *Chief Justice*, that an attachment in chancery on an *alias* and *pluries* is returnable in this court; and is not merely for the contempt, but is really an action, whereon the plaintiff shall recover damages for the delay in not executing the writ; and we have without reason gone on in imitation of chancery. It is a contempt not to return the first *man-damus*. Therefore let a return be made within a week (a).

(a) See *postea*, Easter Term, 12. Will. 3. the case of Cecil and Others of the Town of Nottingham.

Courtney against Collet.

Case 291.

TRESPASS FOR BREAKING HIS CLOSE, treading down the grass and laying nets on the soil, and for carrying away his fish; *nec non de eo quod* the defendant *vi et armis* did break down certain wares, whereby the water over-flowed the piscary of the plaintiff adjoining, *per quod* the fish escaped out of the piscary, and the plaintiff and his servants were hindered from fishing there. Verdict for the plaintiff.

Trespass and
case cannot be
joined.
S. C. Carth. 436.
S. C. 1. Ld.
Ray. 272.
Stra. 635.
Black. 898.

IT WAS MOVED *in arrest of judgment*, that here trespass and case were joined together, which could not be: FIRST, Because no actions can be joined, either when they are different in their nature; or SECONDLY, When they require different answers; or THIRDLY, if they require different judgments (a), as trespass and case do: for in one judgment is *capitur*, and in the other, *quod fit in misericordia*.

Ante p. 73.

BUT IT WAS URGED *on the other side*, that it was all trespass, and that the *per quod* was only in aggravation of damages.

And this Term THE COURT was of opinion that it was all trespass; and judgment was given for the plaintiff.

(a) See *Dalton v. Janson*, 1. Ld. Ray. 58. and 2. Will. 318. 1. Term Rep. 277.

Hinton

Case 292.

* Hinton *against* Hern.

Franchises not to be allowed on motion, until they have been pleaded, and are upon record.

S. C. 2. Salk. 450. 672.
Skin. 12.
1. Salk. 343.
2. Will. 406.
Gilb. C. B. 195.

MOUNTAGUE moved in behalf of THE UNIVERSITY OF CAMBRIDGE, that they might be allowed their privilege in relation to *licensing of taverns* in Cambridge, upon producing their charter.

But it was denied, and said by HOLT, *Chief Justice*, that when a privilege is once ascertained, and it appears upon a record, then it shall afterwards be allowed upon motion; but where it was never contested before, there it must be judicially determined; and so it was done in the case of *Castle v. Litchfield (a)*, in the exchequer.

(a) Hard. 505.

Case 293.

The King *against* Sancky and Tipper.

Where statute gives a remedy for what was before suable in the spiritual court, unless the statute alters the offence or punishment, the jurisdiction is not taken away.

S. C. Holt, 657.
S. C. 1. Ld. Ray. 323.

THE DEFENDANTS being quakers were committed to *Worcester* gaol, for refusing to answer on their solemn affirmation in a cause of substraCTION of tithes, or other ecclesiastical duties:

And it was moved they might be discharged, because in the statute 7. & 8. Will. 3. c. 34. s. 4. for permitting quakers solemn affirmation, there is a clause appointing a speedy remedy against quakers for tithes, viz. by complaint to a justice of peace, which takes away the spiritual jurisdiction; for where the common or statute law gives remedy *in foro seculari*, whether the matter be temporal or spiritual, the consuance of that cause belongs to the king's temporal courts, unless the jurisdiction of the spiritual court be saved or allowed by the same statute. *Co. Lit.* 96. b. *Jr.* 320.

But by HOLT, *Chief Justice*, The remedy appointed by the law for tithes against quakers seems only an additional remedy. The ecclesiastical and temporal courts have herein a concurrent jurisdiction; as in the case of a pension payable out of a parsonage by prescription, notwithstanding the opinion of my LORD COKE on the statute of *Circumspecte Agatis*, you may sue in the spiritual court for the same, though a writ of annuity lies also at common law. But where the statute alters the offence, and makes it of a higher degree, there it takes away the ecclesiastical jurisdiction; as in case of *polygamy*, after a man has been tried for the same: so in case of a bastard-child, where a man has been adjudged the reputed father of it, they cannot proceed for slander on that account.

A commitment in the disjunctive is bad.

Then ANOTHER EXCEPTION was taken, that they were committed for not paying tithes, * or other ecclesiastical duties; in the disjunctive, without shewing certainly for what the suit was; for though the words of the statute are in the disjunctive, yet in the commitment it should be precisely shewn.

And for this exception the defendants were discharged.

The

Hilary Term, 9. Will. 3. In B. R.

The King *against* Williams and Others.

Case 294.

INDICTMENT for rescuing *Borlace* out of the sheriff's custody in the *Inner Temple*; which sets forth, that a *latitat* issued forth against *Borlace*, *Termine Sanctæ Terinitatis*, whereon he was arrested, and they rescued him; and the indictment was quashed, because it does not appear that any legal *latitat* issued out, there being no such Term as *Sanctæ Terinitatis*.

On an indictment for a rescue a writ must be shewn.

Brewster against Kidgill.

Case 295.

CASE, upon a wager concerning a rent-charge of forty pounds a-year, whereof the plaintiff, as son and heir of *Ellen Brewster*, is seised in fee by virtue of a grant to her and her heirs, issuing out of a manor, of which *Kidgill* is terretenant; that the defendant affirmed, it was lawful for him to deduct four shillings in the pound for parliamentary taxes, which the plaintiff denied, &c. And upon issue joined, a special verdict was found, that on the twenty-sixth of *November* 1649, *Robert Langford* was seised in fee of the manor of *B.* and that in consideration of eight hundred pounds paid by *Ellen Brewster*, he granted to her and her heirs a rent-charge in fee of forty pounds *per annum*, with a covenant in the deed for further assurance; and on the back of the deed this indorsement was, "MEMORANDUM, It is the true intent and meaning of these presents, that the grantee and her heirs shall for ever hereafter be paid the said rent-charge, without any deduction or abatement of taxes, charge, or payment out of, for or concerning the said rent, or the said manor or lands charged herewith." And afterwards in 1652, for further assurance, granted and confirmed the rent aforesaid to *Ellen Brewster*, and her heirs, with a *nomine pænæ*; and *Robert Longford* covenants, that at the sealing thereof he was seised in fee, and that it was free from all incumbrances, and that he had power to charge the same; and that the said yearly rent of forty pounds *per annum*, freed from all taxes, shall be for ever hereafter duly paid * at the time and place for the payment thereof, &c.

A covenant in 1649, that *A.* his heirs and assigns shall be paid a rent-charge, free from all taxes, extends to all future parliamentary taxes.

S. C. Salk. 198.
615.
S. C. 5. Mod.
368.
S. C. Comb.
424. 466.
S. C. Carth. 438.
S. C. 3. Salk.
340.
S. C. Holt, 175.
609.
5. Co. 16:
Hard. 87.
2. Brownl. 281.
4. Co. 80.
Carth. 135.
Ld. Ray. 317.
1. Bac. Abr. 540.

* [167]

The question was, Whether the grantor of the rent, and his heirs, shall be obliged to pay the said rent, without any deduction for, or by reason of any tax imposed by parliament futuramente on the said rent?

HOLT, *Chief Justice*, delivered the opinion of the Court, that the covenant doth oblige the grantor and his heirs without deduction. The case is of very great consequence, and has been a question a long time, whether such covenants extend to all future parliamentary taxes whatsoever; which I think would be very hard, and I can by no means agree thereto in this large sense; but as the nature of this case is, WE ARE ALL OF OPINION, that it extends to all

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all those sorts of taxes that shall be given by future acts of parliament (a).

FIRST, When "taxes" are generally spoken of; if the subject matter will bear it, they shall be intended parliamentary taxes given to the Crown. There are divers other things improperly called taxes, as rates for church and poor, sewers; so any imposition that lessens a man's property is called a tax; so in the statute *De Tallagio non concedenda*: But when taxes are generally spoken of, they are to be understood of the highest and most eminent sort of taxes, those in aid of the Crown.

SECONDLY, That which particularly affects this case is, the time when this covenant was made, viz. in the year 1649, when taxes of this nature had been used for four or five years before. This way of assessment began since the war in 1642, and in all those acts, or ordinances, there is this very clause that is now in these acts, on which this question arises: If this covenant had been in the year 1640, it would not have reached this case, because there was no such kind of taxes in being. There have been several ways of taxing; the antient way was by tenths and fifteenths; secondly, by subsidies, properly so called; thirdly, by assessments or royal aids, which are the same; and lastly, by this way of a pound-rate. The tenth and fifteenth is the most antient way of tax (b). The fifteenth was originally set upon every man's head; but since the eighth year of *Edward the Third* that was altered; for then, by commissions into every county in *England*, a valuation was made of all cities and towns at that time, and returned into the exchequer: after which, when a fifteenth was granted, every town knew its proportion, it appearing on the roll of the exchequer what they were to pay; and then each town rated * its own inhabitants to make up the tax; which tax was antiently levied on their goods, and not on their lands; this being a tax on the person, and not on the land, as appears from the *Case of the Abbot of Glastonbury*, 11. *Hen. 4.* 35, 36. But this levying on the goods being found troublesome, they afterwards in most places agreed to levy it *secundum ratam terrarum suarum*, by valuation of every particular acre. Now while this tax continued, this covenant could have had no manner of effect, because no rent was chargeable with this tax, for the occupier and possessor of the land was to pay his share according to the valuation of the land; and the rent was not at all concerned, but the occupier was to pay, though he held the land at a racked rent. After this the subsidy-tax came in. The first I find was 32. *Hen. 8.* which was thus: If a man was taxed for lands and goods, he was not to pay a tax for both, but for that only which was of the highest value; so that this was no tax on

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(a) But see the following cases, *Blandford v. Marlborough*, 2. Atk. 558. *Bradbury v. Wright*, Dougl. 624. *Williams v. Pritchard*, 4. Term Rep. 2. *Eddington v. Norman*, 4. Term Rep. 4.

(b) Spelman Glossary, verbo "Quindecima," and the last chapter of *Magna Charta*, 2. Inst. 76, 77.

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the land or goods; but only on the man, by reason of the land or goods: if he lived in one county, and had lands in another, he was to be taxed in the county where he lived. Now as to this sort of tax there could be no occasion for such a covenant as this, because if the grantee of a rent was taxed to a subsidy, the rent was not taxed alone by itself, but in conjunction with his other land; this continued to the latter end of *King Charles the First*. There was a subsidy in the fifteenth year of *Charles the Second*, but finding by experience, that they were not so beneficial as assessments, they had recourse to them again, calling them royal aids. But ever since the beginning of these assessments there was always a clause, that the tenant of the land might deduct the tax out of the rent; and therefore it is plain the design of the parties here was to make provision against any such deduction for the future. This way of taxing being then become frequent, though they were imposed by an usurped authority, yet those being the powers at that time, and people forced to pay, they therefore endeavoured to secure themselves against them by contracts. There was such a tax in being as the ordinances of *September 1649*, when this covenant was made.

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THIRDLY, Though in truth taxes cannot be granted but by parliament, yet they are not of a foreign nature, but are known in the law, and have always a virtual, though not an actual existence, for they are absolutely necessary on emergent occasions; so that by the constitution of the government, in such cases the Crown is to be supplied by those extraordinary aids; which is the reason that the king may *grant an exemption from all future parliamentary taxes. 19. *Hen. 6.* 62. 1. *Edw. 3.* stat. 2. c. 6. *Dyer*, 52. and therefore this covenant does not provide against an unusual accident, but against a thing well known in our law, as a part of our constitution.

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THE NEXT REASON why this covenant should extend to future taxes, is, because it is granted "to *E. Brewster* and her heirs;" which would be of no effect if not so understood. It appears indeed by the provision made in the late acts, that it was thought that these covenants would have been repealed, except there had been a saving, because it enacts, that the tenant should deduct. This provision was indeed cautious and wise, for preventing disputes, but not absolutely necessary.

FIRST, Because these taxes newly imposed are the subject matter for the covenant to work upon.

SECONDLY, This act can by no means destroy this covenant; because though the tenant has a liberty to deduct, yet the act does not hinder him from paying his rent without it; he does not break the law if he pay his rent without any deduction; and this is the difference when an act of parliament shall or shall not destroy a covenant: If a man covenant to do a thing, which is lawful at the time of the making, and an act come afterwards, and make the thing covenanted to be done unlawful, such an act is a repeal of

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of the covenant; but where a man obliges himself to do a thing, which perhaps was not lawful before, and an act makes it lawful, that act does not repeal the covenant (a). A lease for years was made to a clergyman before the 21. Hen. 8.; he covenanted not to alien without licence; after which the 21. Hen. 8. was made, which prohibited any clergyman to hold any land in farm; whereupon the clergyman assigned without licence, and the covenant was held not to be broken; because the 21. Hen. 8. made it unlawful for him to hold it (b). A tenant in tail was bound in a recognizance not to alien, after which 32. Hen. 8. enabled a tenant in tail to make leases for twenty-one years, or three lives; he made a lease for three lives, and his recognizance was held to be forfeited notwithstanding the statute; because the act giving him only an ability to do it, the condition was not thereby dispensed with: So in this case, it does not oblige the tenant to deduct, it only makes it lawful for him so to do.

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Vide 1. Sid. 7.

THIRDLY, This act was made in this manner only for the better collecting and answering this tax to the Crown. Now when an act is made to a particular purpose, it shall not have any collateral effect to any purpose whatsoever. 19. Hen. 6. 62. *Henry the Fourth* granted to the rector of *Eddington* an exemption from all future parliamentary taxes to the crown, and a subsequent tax was afterwards given to the king, without any saving therein of such charters of exemption, and held that subsequent act does not destroy the grant.

But there are two objections to be answered.

THE FIRST OBJECTION is, that general words shall not be construed to extend to any act to be provided for by subsequent act of parliament, according to the *Archbishop of Canterbury's Case*, 2. Co. 46. To which I answer, FIRST, That the rule taken in that case has several exceptions. SECONDLY, That where such general covenant may secure against such incumbrances, as may be imposed without act of parliament, it may be hard to extend it to parliamentary charges. But in this case the covenant could extend to no other charges, because the tenant had no power, by any law then in being, to pay any tax for the grantee out of the rent due to him.

THE SECOND OBJECTION is, that though this covenant should be good as to the monthly assessments, yet not to this pound rate, which was not in being when this covenant was made. To which I answer, that these two sorts of taxes differ only in form; the nature of the tax is the same; the same things are taxed; and the same clauses of deduction are in both. To conclude this matter, this was a tax in being at the time of making this covenant, which shews plainly that the meaning of the parties was to provide against it. If indeed an act of parliament had given so much money towards the building of *St. Paul's*, that would not have been

(a) Dyer, 27. But see 3. Mod. 39.

(b) Dyer, 48. pl. 5.

2. Eq. Cases Abr. 26. 3. Brown P. C. 401.

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within this covenant; for it extends to taxes to the crown only, which are usual taxes, and then given when this covenant was made.

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There is another matter in which I have not consulted my Brothers, and that is, whether the terretenant in this case is obliged by the covenant: this is a covenant by the grantor of the rent, who was seised in fee of the manor. Now who this terretenant is does not appear, whether he be heir or assignee; for if he be assignee, I do not think him chargeable in law; for this covenant does not run with the land. *Hard. 87.* I make no doubt, but that the assignee of the rent shall have covenant against the grantor, because it is a covenant annexed to the thing granted; but that covenant should run with the rent against the assignee of the land, I see no reason. If this rent was granted so to be paid, it would be another matter; but * here is only a covenant, and no words amounting to a grant; and therefore there can be no relief in this case against the terretenant, but in equity; and therefore for this point I do not see how the plaintiff can have his judgment; for if this covenant should charge the land, it would be higher than a *warrantia chartæ*, which only affects the land from the judgment therein given.

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But THE OTHER THREE JUDGES thought that this covenant might charge the land, being in nature of a grant, or at least a declaration going along with the grant, shewing in what manner the thing granted should be taken, and reckoned the indorsement as part of the deed.

And so judgment was given for the plaintiff.

Sherington against Andrews.

Case 296.

A. SEISED of a rectory of one hundred and twenty pounds *s. C. Comb.* *per annum*, charged with a fee-farm rent of twenty-six pounds *per annum*, was taxed for all the rectory only according to the rate of twenty-five pounds *per annum* for taxes; he retains four shillings *per pound* for the fee-farm rent, which was much more than he really paid: the whole matter appearing in the exchequer, where a bill was brought, it was decreed, that the owner of the fee-farm rent should allow only in proportion to what was paid.

Pickering's Case.

Case 297.

PICKERING seised of land, and *Sir J. Werden* of a fee-farm issuing out of it, paid taxes only after the rate of one shilling and three pence *per pound*, and retained for the fee-farm after the rate of four shillings, at which the land-tax was; on which *Sir John Werden*, owner of the fee-farm rent, brought his bill in the exchequer, and prayed that *Pickering* should set forth the value of the land, and what rent he received, and what he had paid for taxes;

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PICKERING'S CASE. taxes; to which bill *Pickering* demurred, and the demurrer allowed, notwithstanding the above *Case of Sherington* was cited; the whole matter there appearing, and this being on a demurrer, which was made the difference.

Case 298. *Burdeaux against Dr. Lancaster*, Vicar of St. Martin's, and Richard Grefdale, Parish Clerk there.

No fees due for christening or burial, unless by custom.

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S. C. Salk. 332.
S. G. Holt, 317.
Hob. 175.

DR. LANCASTER and *Grefdale* sued *Burdeaux* in the consistory court of the bishop of *London*, alledging therein that *Dr. Lancaster* was vicar, and *Richard Grefdale* clerk of *St. Martin's*, and that *ratione præmissorum, ac etiam* of an immemorial custom, the vicar was intitled to two shillings and sixpence for every child born and baptized within the parish, and twelve pence for the churching every woman; and the clerk was intitled to twelve pence for the registering every child; and that *Burdeaux* was an inhabitant within the parish, and had a daughter born therein, and had not paid.

Burdeaux denied the custom in the spiritual court, and moved here for a prohibition, suggesting, that a clerk is a lay officer, and his fees lay, for which he can only sue in the temporal court; that of common right no fees are due for sacraments; that there was no such custom as was alledged; that all customs are triable by the common law; and that this child was not baptized, nor his wife churched by the vicar; nor his child registered by the clerk.

AND NOW IT WAS URGED *against this prohibition*, that these were fees used for ecclesiastical matters, and therefore might be sued for in the spiritual court; and the rather, because they were small inconsiderable matters, just like private seamen's wages; and that the doctor and clerk did not sue for them as due by custom, but of right by canon law.

HOLT, Chief Justice. Nothing can be due for these matters by common right; and as for the canon law, it is of no authority of itself in *England*, but only so much as has been through custom received here. The Convocation cannot by their canons take money out of people's pockets. *Linwood* says, if a parson takes anything for christening, it is simony; but indeed, says he, something may be by custom; but then this custom can never be good, to take money for christening a child which never was christened by them. This is like the case in *Hob. 175.* where a man died in one parish and was buried in another, and a fee was demanded for his burial in the parish where he died. If you say you ought to christen their children, you ought to libel against them for not christening their children, according to the canon law, but you can never have money for christening when you do not.

Therefore let a prohibition go; and if you think fit, they shall declare, and you may do thereon as you please.

Trantor

Trantor *against* Duggan.

r Case 299.

DUGGAN claimed an estate within the grand sessions of *Wales*, under a deed of settlement, which deed he pretended *Trantor* had got, and preferred a bill in equity for the discovery thereof, in the equity-side of the grand sessions, against *Trantor* who lived in *London*, and served him with a *subpœna* thereon :

The grand sessions of *Wales* cannot sequester the estate of a person who resides out of its jurisdiction.

Trantor moved for a prohibition, suggesting, that no man ought to be troubled by virtue of any process there, except he live within the jurisdiction of the court; and that he lived in *London*, and was served with a *subpœna* there.

S. C. ante, 138.
S. C. Comb. 468.

And a prohibition was granted *PER CURIAM*, saying, they would not prohibit their proceedings in this court of equity, but only their proceeding on any process against any living out of their jurisdiction; for else, if he did not appear there, they would sequester the estate he had within their jurisdiction.

Then it was moved, that *Trantor* might have pleaded this below to the jurisdiction of the Court.

But *THE COURT* said, if he had lived within the locality of their jurisdiction, though in a franchise, or place exempt, it might have been another matter; but where a man lives out of the limits of their jurisdiction, it is no reason to force him to appear there to defend himself. Wherefore, &c.

Thomson *against* Leach.

Case 300.

EJECTMENT.—On a special verdict, the case was : *S. Leach* tenant for life, with contingent remainders in tail; remainder over to *Sir Simon Leach* in tail; remainder in fee to *N. Leach*. The tenant for life, before the contingency happened, surrendered to *Sir Simon Leach*, but at the time of the surrender was *non compos mentis*.

Surrender by a lunatic is absolutely void.

S. C. Carth. 211.
250. 435.
S. C. Comb. 438. 468.

THE QUESTION was, Whether this surrender by a *non compos* was void? and if not void, but only voidable, Whether there be such a right still remaining in the *non compos*, as is sufficient to support the contingent remainder?

S. C. Comy. 45.
S. C. 1. Eq. Abr. 278.
S. C. Holt, 357, 623. 665.
S. C. 3. Lev.

And *PER CURIAM*, The surrender is void; for whatsoever is done by an infant, or *non compos mentis*, which takes effect only by deed, is void (a); but it is otherwise in case of a feoffment, by reason of the notoriety and solemnity thereof.

284.
S. C. 3. Mod. 296. 301.
S. C. 1. Ld. Ray, 313.
S. C. 2. Salk.

427. 618. 675. S. C. 3. Salk. 300. S. C. 1. Show. 296. S. C. Show. P. C. 150. S. C. 2. Vent. 398. 3. Bac. Abr. 87, 88. 138. 4. Bac. Abr. 315.

(a) See *Hudson v. Jones*, 3. Bac. 1794. *Saunderson v. Marr*, 1. H. Bl. Abr. 139. *Abbott v. Parsons*, 3. Burr. Rep. 75.

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3. Co. 45.

3. Co. 42. b.

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Vide 3. Co.

The Case of

Fines, 10. Co.

Seymour's Case.

And *per* HOLT, Chief Justice, If *non compos* make a feoffment by letter of attorney, he is as much disabled to avoid that feoffment himself as if he had made livery in person; and yet it is a void feoffment to all other persons. The true reason why a feoffment by an infant, or *non compos*, is but voidable, is because of the notoriety and solemnity of the feoffment and livery, that antient way of conveying, which is in view of the whole country, who saw the transmutation of possession; and therefore it was preferred before all secret ways; and therefore if tenant in tail make a * feoffment, it devests the remainder and turns all to a right. But if tenant in tail make a bargain and sale, or a lease and release in fee, he makes no devesting thereby, but only passes an estate for his life. The case of *Loyd v. Gregory* (a) is express, that the surrender of an infant is void. If an infant grant a rent-charge, and the grantee distrains, the infant may have trespass, which shews the grant to be void; and where it is said in the Books, *Whelpdale's Case* (b), that the grant of an infant is not void, but only voidable, the meaning thereof is, that he cannot plead *non est factum*, and give infancy in evidence, because it has all the formalities of a deed, as writing, sealing, and delivery; but he shall shew the special matter whereby it may appear, that as to the operation of the deed, or efficacy of it, it is void. An infant and *non compos* are parallel in all cases, but only as to the *non compos's* disabling himself; but the heir may enter on the alienee of the idiot without *scire facias*, but not during the life of an idiot or *non compos*. There has been another question started worthy of consideration, *viz.* Supposing the *non compos* had made a feoffment in fee, yet whether is not a right remaining in him sufficient to support a contingent remainder, though a right of action will not? for the reason why he cannot avoid his feoffment is not for want of right, but because of his personal disability: and if tenant for life make a feoffment during his lunacy, the king, upon office found that he is a lunatic, may avoid the feoffment by *scire facias*, and so revert the inheritance; and if so, why may he not also prefer a contingent remainder? A right of entry will, though a right of action will not support a contingent remainder: as if there be tenant for life, with a contingent remainder over, and tenant for life be disseised, the whole estate is devested, but the right of entry in the tenant for life shall support the contingent remainder: but if tenant for life be disseised, and a contingent remainder, expectant upon his estate, does not vest before a descent is cast, then it is gone, because it is turned into a right of action; though now it may be preserved longer by the statute of *Hen. 8. c. .* whereby, except a disseisor be five years in possession, a descent will not take away his entry. The case of *Bigot v. Smith* (c) is a remarkable case; which was, Baron and feme jointenants for life, remainder to the heirs of the survivor of them; the husband alone made feoffment

(a) 1. Cro. 502.

(b) 5. Co. 119. 10. Co. 43. Salk. 675.

(c) 1. Cro. 102.

In fee and died, the wife survived; and the question was, * Whether this contingent remainder could arise out of the wife's estate? and held that it should not; because, that during the coverture she had no right of entry or action, but the husband had the power of the whole estate; and though her estate and the contingency happened and started up together *eo instante*, yet this was not sufficient, because the particular estate that should support the contingency ought to be precedent. But there is no necessity to hesitate in this point, because on THE FIRST POINT it is plain that judgment ought to be for the plaintiff.

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against
LEACH.

Britton against Cole.

Case 301.

TRESPASS for taking forty-three sheep and two lambs, the twentieth of May, in the seventh year of William the Third. The cattle of a stranger, *levant et couchant* on land extended

The defendant justifies, that the twelfth of February, in the sixth year of William the Third, before the trespass alledged, the king's writ of *levari facias* issued out of THE EXCHEQUER to the sheriff of Gloucester, reciting, that the late sheriff of Gloucester, by virtue of a *capias utlagatum* issuing out of the common pleas against Francis Cresset, who was outlawed in Somersetshire on the twelfth day of June, in the fifth year of William and Mary, at the suit of Thomas Cole, *modo defendantis*, and Mary his wife, in a plea of debt, had returned, that the said F. Cresset was then seised in fee of the lands in question; and that he seised the lands into the king's hands, which were found to be of the annual value of fifty-five pounds, and therefore the king commands the sheriff that all and singular the rents, issues and profits of the premises arising thereon, from the taking the same into the king's hands, to the Feast of the Annunciation then next ensuing, should be levied according to the annual value thereof, so that the money thereof arising should be had before the Barons of the Exchequer at such a time; by virtue of which writ the sheriff made a precept directed to all his bailiffs, and particularly to Anth. Powell, J. O. and J. Powell, to levy the money aforesaid, according to the tenor of the said writ, out of the issues of the said land; and because the said forty-three sheep and two lambs were, after the said inquisition, and before the Feast of the Annunciation, *levant et couchant* upon part of the premises, the defendant requested the said A. Powell and J. Powell to take and drive away the said sheep and lambs, according to the tenor of the said writ; *super quo idem Josephus P. and J. Powell* took and drove away the said sheep and lambs.

on an outlawry, may be taken by *levari facias*, for they are the issues.
S. C. 5. Mod. 112.
S. C. Salk. 395. 408.
S. C. Comb. 434. 469.
S. C. Carth. 441.
S. C. Skin. 617.
S. C. Holt, 421.
S. C. Comy. 51.
S. C. 1. Ld. Ray. 305.
8. Mod. 358.
3. Bac. Abr. 757.
4. Bac. Abr. 460.

On which plea the plaintiff demurred, and the * defendant joined in demurrer.

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And HOLT, Chief Justice, delivered the opinion of the Court.—The case in short is: Cresset is outlawed in a personal action; and on a special *capias utlagat*. and inquisition thereon, such lands

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are found to be his, and returned to be of the annual value of fifty-five pounds; the plaintiff's cattle are found upon the same land *levant et couchant*; they are taken by virtue of a *levari facias*; and the question is, Whether this taking be justifiable? and we are of opinion it is.

FIRST, Because there is a direct command to the sheriff to levy this duty, according to the annual value, out of the issues of the land; and cattle *levant et couchant* on the land are issues. The statute of Will. 2. c. 39. says, that *omnia bona mobilia* on the land are issues; and *omnia mobilia* comprehend cattle. 2. Inst. 453.

11. Hen. 7. 7.

Postea Mich.

12. Will. 3.

Dubois v. Trant.

SECONDLY, The land is debtor to the king, which makes the cattle liable; and if the king had not this remedy, his pernancy of the profits would signify nothing, for it would be in the power of the party outlawed to defeat the king; he will let out the ground or take in cattle on contract to feed, and so run away with the whole profits, and there is no remedy for the king to get the money on the agreement. Now if the person outlawed, during his outlawry, make a feoffment in fee, shall not the cattle of the feoffee be issues of the land? Without question they shall; for the feoffee shall take the land in the same plight as the outlawed person had it, and the feoffment shall not determine the king's right; notwithstanding the Book of 21. Hen. 7. 7. which says, the king's interest shall be determined by the alienation of the outlawed person, which Book is to be understood with this difference, If a man be outlawed, and before inquisition taken he aliens his estate, and then inquisition is taken, the alienation of the real estate, before inquisition taken, prevents the king from having the pernancy of the profits; but if he make alienation after the inquisition taken, there the king's pernancy of profits continues, and this is the constant course of the exchequer; so is the case of *The Attorney General v. Freeman* (a), and *Winsor v. Savill* (b). The reason of which difference is, that until the inquisition be found the king has nothing; for the inquisition that is taken on a special *capias utlagatum* is an office that intitles the king; so that if the alienation be before office found, then it is before the king has a title; but after a title is once vested in the king, that shall not be divested by any act of the party. "Issues and profits" cannot mean the goods of a person outlawed, for he cannot have goods; if after outlawry he purchases them, they are the king's without office; but as to the real estate, or a chattel real, the king cannot be intitled without office, but for chattels personal he may. Since issues may be levied on feoffee or alienee that comes in after inquisition, why not in this case? nay, perhaps the plaintiff here may be alienee; it is not necessary the king's officer should take notice of his title; he ought to make it appear. Suppose this plaintiff had a right to the land precedent to the outlawry; as for instance, a

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Cro. Jac. 82.

(a) Hardres, 101.

(b) Raym. 17.

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lease for years from *Cresset*, yet if this be not found by the inquisition, or afterwards allowed in the exchequer, he cannot have an action of trespass; for if it be not found, he must go into the exchequer by way of *monstrans de droit*, and plead it there; for he shall not falsify the king's title in an action. It may be the plaintiff had a title, but then he ought to have shewn that he had pleaded it in the exchequer, and had it allowed there. Now if the feoffee's cattle be forfeitable, why not the cattle of one who contracts with the outlawed person? and much more the cattle of a stranger, or mere trespasser; for a wrong-doer shall not have more advantage than he that has right. The case of *Stafford v. Bateman* (a) has been quoted, where it was held, that on a *feri facias* for the king's debt no goods could be sold but the debtor's; but that case is quite different from this, for that was a *feri facias de bonis et catallis* of the debtor, on which the sheriff had no authority to take a stranger's goods; but this is a *levari facias de exitibus terræ*; to explain which it is to be considered there are several executions for the king: first, a *capias* to take the body only; secondly, a *feri facias*; thirdly, an *extendi facias*, which is called the long writ; and fourthly, this *levari facias de exitibus terræ*; by none of the three first could the plaintiff's cattle be taken. Now as to issues, when they are forfeited, the whole inheritance is charged with them. If tenant for life be returned on a jury, and make default, whereby he forfeits issues, and dies, the arrear of the issues shall be levied on the remainder. The land is debtor, and becomes debtor for default of tenant for life only; for which this reason is given, that it is a public service charged on the fee-simple, and therefore the land must be charged with the issue, by whomsoever default was. Now indeed, how this be in case of an outlawry, I doubt; for if tenant for life be outlawed, and he is found to be but tenant for life * by inquisition, and there is an arrear of issues, I do not know whether it can be levied on the reversion; because it arises from the tenant for life's own particular neglect and default. But however it makes no alteration to those that claim under tenant for life. In *Sir Henry Clare's Case* (b), two tenants in common, one was indebted to the king, and on process the beasts of the other were taken; and it was held they could not; because the one tenant in common may put his beasts on all the lands; and so is 2. *Roll. Abr.* 457.; but says the Book, "it will be otherwise for cattle that come in by wrong on the land of the king's debtor, and are there *levant et couchant*." It is said in 2. *Roll. Abr.* 159. that the king may distrain the beasts of a stranger *levant et couchant* on a *levari facias*, but he cannot sell them; which must be a mistake in the printer, or in those who had the management of *Roll's* manuscript; for the end of a *levari facias* is to have a sale; and therefore to allow they may be taken on a *levari facias*, and not sold, is a contradiction. No *levari facias* issues but as to lands, and where the land is debtor, the cattle of a stranger, that are *levant*

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Kelw. 66. 2.

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(a) 1. Cro. 431.

(b) Lane, 96.

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against
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et couchant, are as liable as the cattle of the owner; and so it is in the case of a rent-service. Nay, if one seised in fee grant a rent-charge, though this be a charge on the land by his own act, yet if his neighbour's cattle escape thereinto, and happen to be there *levant et couchant*, they are distrainable, because the land is debtor. This case was adjudged in point in the exchequer, *Hodgson v. Toobigle (a)*, which was trespass, as this is; and HALE, Chief Baron, said, that by virtue of a *levari facias de exitibus terræ* of a person outlawed, the cattle of a stranger may be taken, and so is the constant practice of the exchequer; whereupon the party, seeing the opinion of the Court, relinquished his suit, so that no judgment is entered: and there is another case in point in the exchequer, *Wrightson v. Rayner (b)*. So that we think the defendant's plea good in substance, and that the cattle were liable to be taken and sold by virtue of the *levari facias*.

There have been several exceptions taken to the pleading.

In a justification by a stranger under a writ of *levari facias* against an outlaw, a judgment to warrant the writ must be stated in the plea.*

* [179]

FIRST EXCEPTION, That the defendant, not being an officer, ought to have pleaded the record of the outlawry; which seems to be a good exception, but something complicated, which I will explain: If there be no judgment, and a *capias ad satisfaciendum* or other execution be taken out, the sheriff, and all other persons acting under him in the execution, are justifiable, though there be no judgment. But if a stranger of his own head interpose, who is not concerned, and he sets on the sheriff to do execution, he cannot justify this: or suppose it be the plaintiff who sued out the writ, he must in his justification plead the judgment; for if there be no judgment he is a trespasser, *Turner v. Felgate (c)*. Now if the defendant had justified that he did it by command, or in aid of the officer, then he had been in the same case with the officer himself; but if he will come in without any authority, though he be a party concerned in the suit, yet he ought to shew some foundation: so in outlawry, as well as in the other case, he ought to shew there was some judgment to warrant the *capias ad satisfaciendum* or *fieri facias*. In trespass, the defendant justified distraining the cattle *damage feasant* as bailiff to A.; in which case, though the cattle were *damage feasant*, yet if A. did not command the defendant, he was a trespasser; and in this case the command was traversable. 2. *Leo*. 196. 1. *Roll. Rep.* 46. So in replevin, the defendant makes countenance as bailiff to A. that he took the cattle *damage feasant* by the command of A.; the command is traversable, because damages are only concerned, *Fuller v. Trimwell (d)*. But in replevin of distress for rent, the command is not traversable, because it is to try a right, *Buller's Case (e)*. By all which it appears, that though the king's writ shall justify an officer, yet it shall not others, except they justify under an officer, or there be a judgment to warrant the writ, which must be shewn by him in his justification; and

(a) Easter Term, 18. Car. 2.

(b) Michaelmas Term, 22. Car. 2.

Roll 14.

(c) Ray. 73.

(d) 2. Leon. 215.

(e) 1. Leon. 50.

therefore

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therefore he should have shewn the outlawry to be in being *prout patet per record. in C. B.* for which omission the plea is ill.

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ANOTHER EXCEPTION that has been taken to the plea is, that it is not said that the writ was delivered to the sheriff, or the warrant to the bailiff. Now this is no good exception; for though the course be to say so, yet this is a plea in bar, wherein certainty to a common intent is sufficient; and if they took any of the goods before the writ came to the sheriff, or the warrant to the bailiff, it must be shewn in the replication. *Green v. Jones (a).*

A plea in justification is good, although it do not state that the warrant was delivered to the sheriff.

THE THIRD EXCEPTION to the plea was, that the defendant did request *Anthony* and *Joseph* to do execution, and that *John* and *Joseph* did it, which is not pursuant to the request: and though, according to *Lastbrook's Case (b)*, execution may be done by one, though the warrant be to four, yet here, as the defendant has pleaded, the taking by *John* is as much a trespass as the taking by *Joseph*; so that as * to the merits of the cause, we are all of opinion for the defendant;

A plea stating a warrant to *Anthony* and *Joseph*, and that it was executed by *John* and *Joseph*, is bad.

* [180]

But for the insufficiency in pleading, judgment must be for the plaintiff.

1. Saund. 18.
Co. Ent. 42.
106. 667.

(a) 1. Saund. 298.

(b) Hutt. 127.

The King against Hewson.

Case 302.

AT THE GENERAL QUARTER SESSIONS at *Leicester* an order was made, that whereas the vill of *Charley* had no constable, and no court-leet being kept there, the court did order, that *Thomas Hewson*, inhabitant of *Charley* aforesaid, should be sworn to execute the office of constable for the year ensuing there, or until another be sworn in his place; and that on the death or removal of the said *Thomas Hewson* from the said office, that some one or other of the inhabitants should take upon them the said office, *toties quoties* there should be any vacancy: and afterwards at the same sessions another order was made, reciting the appointment of the said *Thomas Hewson*, and that he, being present in court, was divers times requested to take upon him the said office, yet he peremptorily refused the same, in contempt of the court; for which he was committed to the county gaol until he should take upon him the said office, or otherwise be legally discharged: which orders being removed by *certiorari*,

If there be a will, and no court-leet held within it, the justices at sessions may appoint a constable, although no constable had ever been appointed there before.

S. C. 1. Salk. 175.
S. C. Holt, 153.
See 1. Mod. 13.
1. Bac. Abr.

It was moved to quash them, because the justices of peace have no power; for the election of constables belongs originally to the leet and touns; and the 13. & 14. *Car. 2. c. 12. s. 15.* gives power to justices of peace only in case of death, or removal of the constable out of the parish, or continuance of a constable beyond a year, and this only in default of the leet; which is not this case, for they appoint a constable where was never one before.

439, 440.
2. Show. 75.
2. Stra. 1050.

Then they could not have imprisoned him for refusal, but he should have been indicted.

Quod Cur. concessit.

And as to the first matter, per *HOLT, Chief Justice*, Every vill must have a constable, otherwise it is but a hamlet; they are commensurate

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menfurate one with another ; and though a constable be properly of a certain division, yet if a warrant be directed to him by name, to execute it out of his division, he may do it ; but if it be generally, "to all constables, headboroughs," then it must be taken respectively, and they can then act only in their division(a). If there be no leet at all, then you must go to the sheriff's tourn. The leet is but a franchise derived out of it ; and any matters done at the sheriff's tourn which is within the leet's jurisdiction is not void, * and *coram non judice*, but only an infringement of the franchise. How can justices of peace make a constable, who is an officer at common law, and they only by statute, only there may have been such an usage from the neglect of those to whom it properly belonged ; perhaps there may be some old statute for it, which is lost. Ancient usage for three or four hundred years is good evidence of a law. If an act of parliament be lost or embezzled, the law remains still. May be the conservators of the peace did it at common law. That his opinion was, that the justices of peace could not create a constable where there was none before ; though he had heard it said, in my Lord Chief Justice KEILING's time, that if a town be newly built, and they want a constable, that the justices of peace may (b).

And it being in this case contested, whether there was a constable before, it was ordered to be tried.

(a) See *Rex v. Chandler*, 1 Ld. Ray. 546. *Wallace v. King*, 1. H. Bl. Rep. 13. (b) See *Fletcher v. Ingram*, 1. Ld. Ray, 69. 5. Mod. 127. 1. Salk. 175.

Case 303.

Anonymous.

Privilege.

IF AN OFFICER plead his privilege by writ, you cannot deny his being an officer.

Case 304.

Lamb against Jenison.

The stile of justices in *Durham* is always *itinerant*.

ERROR TO REVERSE A JUDGMENT in *Durham*, in ejectment before justices *itinerant*.

The error assigned was, that a *tales de circumstantibus* was awarded, which ought not to have been ; for 5. Eliz. c. 25. which gives the *tales de circumstantibus* in *Wales* and the counties palatine, gives it only before the justices of the great sessions, and not before justices in eyre, as these are.

But THE COURT held this to be no error, because the stile of the justices in *Durham* is always justices *itinerant* ; and there is no great sessions at all in the county palatine ; and therefore this act must be understood of such courts therein as answer to the grand sessions in *Wales*.

Then

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Then it was urged, that "*per Cur.*" was omitted in the judgment. "*Ideo consideratum est;*" without saying

But it was answered AND RESOLVED, that "*ideo consideratum*" "*per Curiam,*" "*est;*" without saying "*per Cur.*" was good in the county palatine courts, which are looked upon in that respect as the courts of *Westminster*. 1. Saund. 74, 75.

And so the judgment was affirmed.

HILARY

HILARY TERM,

The Ninth of William the Third,

I N

The Court of Chancery.

BEFORE

Somers, *Lord Chancellor.*

Sir John Holt, Knt. Chief Justice of B. R.

Sir Treby, Knt. Chief Justice of C. B.

* [182]
Case 305.

* *Berty against Lord Faulkland.*

Devise to *A.* in
case that within
three years after
his death she
should marry
Lord Guildford;
and then if not,
devise over;
proposals being
made to *Lord*
Guildford and re-
fused, she mar-
ries another
person. Decreed,
this was a con-
dition precedent
to the vesting
the estate, which
not being com-
plied with, the
estate to go o-
ver.
Quere, Whether
not determined
otherwise in the
House of Lords.

THE CASE was: *John Cary* the testator being seised in fee of the lands in question, by his will, the tenth of September 1685, devised them to divers trustees therein-mentioned, and their heirs, under several trusts therein-mentioned, viz. to the trustees, for the first three years after his decease, to take the profits and employ them to the several uses appointed by him; and afterwards the trustees to stand seised in trust for his niece *Honor Willoughby*, (now wife to the plaintiff) for her life, "in case she shall, within three years next following after his decease, be lawfully married to FRANCIS *Lord Guildford*; and in case the marriage shall take effect, then the remainder to the issue male begotten on her body by the said *Lord Guildford*; but if there be no such issue, or in case the marriage shall not take effect and be solemnized within three years, then the trust is devised to ANTHONY *Lord Faulkland*, for his life; remainder to his first son in tail, &c.; and for want of such issue, to *Edward Cary* for life; remainder to the first son in tail, &c." who is the present *Lord Faulkland* and now defendant. The twentieth of the same month the testator made a codicil, reciting therein his devise to his niece *Willoughby*, and thereby declared that it was his will, "that if the said marriage did take effect before the age of consent of them, or either of them, that unless the said marriage should be confirmed by both the parties at the age of consent, the said niece should have no benefit by the said trusts limited, but they should cease unto her." *J. Cary* the testator died; after which there were

S. C. 1. Eq. Abr. 110. S. C. 2. Vern. 333. S. C. Holt, 230. S. C. 2. Freem. 220, Cases T. T. 41. 1. Peer. Wms. 666. Fearn's Com. Rem. 375. 3. Peer. Wms. 65. 1. Atk. 361. 381. 500. 4. Brown's P. C. 194. 3. Atk. 504. Powell on Devises, 247. 480.

some

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some transactions between the trustees of *Lord Guildford* and *Mrs. Willoughby* concerning the said marriage; but there were some misunderstandings between them; and by an order of *Lord Chancellor JEFFERIES*, on a petition to him, it was ordered, that the young lady should not be married to my *Lord Guildford*, unless he would consent to the proposals made by *Mrs. Willoughby's* trustees. The three years expired, and *Mrs. Willoughby* never married to my *Lord Guildford*; but in the year 1691 married *Mr. Bertie*.

BERTIE
against
LORD
FAULKLAND.

ANTHONY *Lord Faulkland* died without issue; *Edward Cary* died; and *Mr. Bertie* and his wife exhibit their bill against the trustees of *J. Cary* and the first son of *Ed. Cary*, the present *Lord Faulkland*, to have an account of the profits of * *J. Cary's* * [183]
estate, and to have a conveyance executed to them according to the trusts in the will.

Upon which THE QUESTION is, Whether, seeing there was no marriage had within three years, and there was no fault in the young lady, she should be relieved in equity, and have this estate decreed to her for life, remainder over to the heirs of her body by *Mr. Bertie* begotten?

And it was adjudged by *SOMERS, Lord Chancellor*, assisted by *HOLT, Chief Justice*, and *TREBY, Chief Justice*, that the plaintiff could have no relief.

HOLT, Chief Justice. All letters and discourses of the testator of his kindness to his niece ought to be totally rejected; because, both before the statute of Frauds and Perjuries, and especially since, we ought to confine ourselves to the words of a will, and not have recourse to any thing extrinsic or *dehors*; for to explain a will by other papers and declarations, would be to make them part of the will; whereas a will is a complete act of itself, and repeals all former wills and declarations whatsoever. In this case the plaintiff can have no relief: FIRST, Because this estate is given to *Mrs. Willoughby* on a condition precedent, of her being married to *Lord Guildford* in three years. Now the nature of a condition precedent is, that it must be performed before ever the estate can vest (a); and if the performance of the condition become impossible by the act of God, yet the estate could never accrue to her (b); so if it become impossible by any other inevitable accident, as in this, if *Lord Guildford* had died within the three years after the death of *Cary*, before marriage with *Mrs. Willoughby*, whereby the condition becomes impossible by the act of God, yet the land could never accrue to her (c). This is the law; I know of no contrary

(a) *Reeves v. Hearne*, 5. Viner Abr. 343. *Harvey v. Aston*, 1. Atk. 361. *Fullen v. Ready*, 1. Wils. 21. 2. Atk. 597. *Reynick v. Martin*, 3. Atk. 330. 1. Wils. 130. *Randall v. Payne*, 1. Brown's C. C. 55. *Mansell v. Brown*, 1. Brown's C. C. 473.

(b) *Popham v. Bamfield*, 1. Vern. 83. *Thomas v. Howell*, 1. Salk. 170.

(c) *Peyton v. Bury*, 2. Peetr. Wms. 626. *Graydon v. Hicks*, 2. Atk. 16. *Jones v. Suffolk*, 1. Brown's C. C. 529.

precedent

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BARTY
against
LORD
FAULKLAND.

• [184]

precedent in equity ; the relief therein has always been in case of subsequent conditions, which determine an estate, and are not favoured in law ; as to which, if the condition become impossible, the estate shall not be defeated ; but as to a condition precedent the law requires strict performance ; and if that become impossible, the estate can never arise. And as the law is so, so is apparently, SECONDLY, the intent of the testator ; for he gives on a condition, which he knew was not in the sole power of his niece to perform. But then, THIRDLY, that which makes it beyond all contradiction is the codicil, which shews that he intended to give her the estate on condition that there should be an indissoluble estate between her and Lord Guildford ; and the estate after her death is only given to such heir male as should be begotten on her body by the Lord Guildford : * Where an estate has been given on condition, and the substance of the condition has been performed, there equity has relieved, because the testator aimed at substance, and not at circumstances. This was the case of *Popham v. Rogers* (a) : A devise was made of lands to Sir F. Popham, on condition he should let two-thirds thereof descend to his heir ; he did not do so, but permitted other lands to the value of two-thirds to descend ; and it was held in equity to be a sufficient performance of the will, because the design of the testator was to make Sir F. Popham a good husband to provide for his posterity ; and the intent of the testator was satisfied thereby. Now here the intent was, that she should marry Lord Guildford ; she marries one whom it does not appear Cary had any kindness for. The case of *Fry v. Porter* (a) is stronger than this. Mrs. Willoughby was in no fault at all, she did what honour and modesty would permit.

And so TREBY, Chief Justice, agreed it was a hard case, but cannot be helped ; the will of the testator ought to be observed ; and his estate in the same manner, and on the same conditions, as he limits it.

SOMERS, Lord Chancellor. Mrs. Willoughby was to take on a condition precedent ; nothing was to vest in her until after three years ; at which time, if she was not married to Lord Guildford, the trust was to vest in Lord Faulkland : the previous declarations of his intentions signify nothing ; the will is an express revocation of them all. As for the conditions not being literally performed, if my Lord Faulkland had done any unfair act to hinder her marriage, he being to have advantage by it, equity might have relieved ; but on the other hand, I am not clear that she should be relieved if my Lord Guildford had died or refused to marry her. It may be a hard and unreasonable disposition ; we cannot help that ; we cannot make a new will. He differed in thinking she had done all that could be done by her ; for she put terms on my Lord Guildford where the will put none, and which could not be reasonably required ; but however that be, the precedent condition is not per-

(a)

(b) 1. Vent. 199. Raym. 236.

2. Lev. 21. 1. Mod. 86. 300. 2. Kcb.

756. 787. 814. 867. 3. Kcb. 19.

1. Eq. Abr. 112. 1. Chan. Cases, 138.

2. Chan. Rep. 26.

formed,

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formed, and it is not material to them in remainder what the reason of it is. It cannot be in this case objected, that the condition is performed in substance, because the condition is of a thing which cannot be valued. Paying of money, or conveying an estate, is of a thing which will admit of a valuation; but this case of marriage cannot. Then the proceedings in the time of the *Chancellor JEFFRIES*; it plainly appears by the suggestion of the petitions, and the orders thereon, that * the Lord Chancellor was not informed of the whole matter; and it is evident they designed he should not, for there was only a petition, and no formal bill, wherein all persons interested might be made parties to it, and have been heard what they had to say relating to the same. On the whole matter, I think the lady was to have no estate but on performance of the condition precedent, which she never did perform. I do not see that anything was sincerely done on her part to answer the intent of *Cary's* will; there was a great deal done in a colourable manner, but she absolutely refused the proposals made by *Lord Guildford's* trustees, or did as good. Now the defendant is a stranger to all these proceedings; and therefore I think on the whole, that the trustees ought to execute the estate to *Lord Faulkland*, and the heirs males of his body, remainder to the right heirs of *Cary* the testator; and *Mr. Bert's* bill be dismissed.

BERTY
against
LORD
FAULKLAND.

* [185]

An appeal was had to the House of Lords, where no determination, but ended by compromise.

Salk. 232. Says
it was reversed.
Quare.

The King against The Bishop of Chester and Others. Case 306.

A WRIT OF ERROR from the court of common pleas in a *quare impedit*.

Grant to a man
by the name of
knight, who was
only squire, is
void.

THE QUESTION was, Whether an advowson granted to *Sir William Thexton* by *King Charles the First* passed?

And by *EYRE* and *ROKEBY*, *Justices*, and *HOLT*, *Chief Justice*, it was adjudged, that the advowson did pass, and therefore judgment ought to be reversed (a).

S. C. 1. Salk.
560.
S. C. 3. Salk.
24. 40.
S. C. 5. Mod.
297.

TURTON, *Justice*, argued *à contra*.

BUT ANOTHER POINT was started, *viz.* a variance in the grant, as pleaded in the letters patent. It is set forth in the plea, that *King Charles the First* granted the advowson "*W. Thexton*, "*armigero, et postea militi*," and the letters patent are "*Willielmo Thexton, militi*."

S. C. Show. P. C.
212.
S. C. Skin. 651.
S. C. 1. Ld. Ray.
292.
Ray. 292.
5. Mod. 335.
2. And. 32.
3. Lev. 377.
Moor, 413.

And for reason of this variance the judgment was affirmed by *EYRE* and *TURTON*, *Justices*, and *HOLT*, *Chief Justice*.

BUT *ROKEBY*, *Justice*, *à contra*; because he said, a grant made to a man by the name of knight who is not a knight, is not void,

Hob. 224. 230.
4. Mod. 200.

(a) See the pleadings, the state of the this part of the case, 5. Mod. 297 to case, and the judgment of the Court on 305.

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so as *constat de personâ*; and there is nothing in this record to oblige them to take "*William Thexton, Knight*," and "*William Thexton, Esquire*," for two distinct persons; and therefore the Court would never intend it on purpose to make void a grant.

BUT BY THE OTHER THREE it was held, that a man who is not a knight cannot take by the name of a knight. For, FIRST, "knight" is part of a man's name, as is held by all the Books without contradiction, and is not only an addition (*a*).

• [186]

9. Co. 49. b.

SECONDLY, A knight is a name of dignity, * and a name of dignity is as much part of a man's name as his Christian name; and a grant made to a man by a wrong Christian name cannot be good; it must *constare de personâ*, not in the plea only, but in the grant itself. Now it does not appear by that, that "*William Thexton, Knight*," and "*William Thexton, Esquire*," are the same person. Now the name of *esquire* is certainly drowned in the name of *knight*; for all names of worship are drowned in names of dignity.

But it is objected, that though a man be no real knight, yet he may be a reputed knight; so a name of reputation will be a sufficient description to take by.

To which it was answered: First, That he who is a reputed knight, and yet is not a knight, cannot take by that name; for where a man takes by name of reputation, there must be some foundation to ground that reputation upon; as there is in case of a bastard, who takes by name of a son; but there is no foundation for a man to be a knight who is no knight.

Vide 8. Co. 16. b.

But it may be objected, that names of dignity may be supported by reputation; as the eldest son of a duke hath the title of a marquis or earl. Now suppose a grant was made to the eldest son of a duke by the name of marquis, that grant would be good, because there is a foundation for it: for by the laws of heraldry, every duke's eldest son takes place as marquis, that is, after all real marquisses; and the common usage of the realm gives them those titles in all writings now-a-days; but the old conveyances were cautious in so doing, they called them such a one "esquire, commonly called marquis, &c.;" and even in modern conveyances they are always mentioned to be "the eldest son of such a one." It is said by HUTTON and RICHARDSON, in the debate of the *Earl of Pembroke's Case* (*b*), that if a grant be made to one by the name of knight who is no knight, it is a good grant; but there is no foundation for it; for if that be so, a name signifies nothing; and *Thomas* may as well take by the name of *John* as an *esquire* by the name of *knight*: but supposing reputation would have done, yet the defendant should have averred, that he was "an esquire, *sed cognit. et reputat.* by the name of knight."

EYRE, *Chief Justice*. If a feoffment be indeed made to a man by a wrong name, but livery is made to him in person, there the

(a) See Year-Books 4. Hen. 7. pl. 7.
32. Hen. 6. pl. 29. 8. Edw. 4. pl. 23.
2. Inst. 394. Hutton, 41.

(b) Litt. Rep. 223.

feoffment

feoffment is good, because *constat de personâ*. And the Books put a difference between a grant that has its operation by a deed itself, and where it is by livery ; in the former it cannot be good, in the latter it is. In the case of the *Earl of Pembroke* (a), * the issue in a *quare impedit* was, Whether *Sir William Sandys* granted the next avoidance by the name of *Sir William Sandys, Esquire* ? and the Court held, that the verdict had made this a good grant, but without that it had been void. As to *Lord Ewer's Case* (b), a grant was made to my *Lord Ewer* by the name of *R. Ewer, Knt. Lord Ewer* ; and though he was not a knight at that time, the grant was held good ; but the reason of that was, because it was a sufficient description of the person, there being but one *Lord Ewer* at the time : as in *Co. Lit. 3. a.* if lands be given to *R. Earl of Pembroke*, when his name is *Henry*, or *George Bishop of Norwich*, when his name is *John*, the grant is good, because there can be but one *Earl of Pembroke* or *Bishop of Norwich* at a time ; but here the grant is to *Sir William Thexton, Knight*, and the defendant pleads it to *William Thexton, Esquire*, which are two several persons ; for which reason judgment ought to be affirmed.

THE KING
against
THE BISHOP
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This judgment was afterwards reversed in the House of Lords.

(a) Litt. Rep. 181. 197. 223. 1. Cro. (b) Cro. Jac. 240. 1. Bulst. 21.
173. Jones, 215.

E A S T E R T E R M,

The Tenth of William the Third,

I N

The King's Bench.

Sir John Holt, *Knt. Chief Justice.*

Sir Thomas Rokeby, *Knt.*

Sir John Turton, *Knt.*

Sir Samuel Eyre, *Knt.*

} *Justices.*

Sir Thomas Trevor, *Knt. Attorney General.*

John Hawles, *Esq. Solicitor General.*

* [188]

Cafe 307.

Smith *against* Johnson.

Money to be brought into court on *assumpsit*, but not on *quantum meruit*.

CASE for work done on a *quantum meruit*, and also an *indebitatus assumpsit*. Upon motion to bring so much money into court, and to be struck out of the declaration, the Court granted it as to the *indebitatus assumpsit*, but refused it as to the *quantum meruit*; and the Court said, that such motions had been sometimes * obtained, where a *quantum meruit* and *indebitatus* were joined together, yet regularly they ought not to be granted on a *quantum meruit*, for who can tell what a man deserves until it be tried (a).

(a) See *Burman v. Shepherd*, ante, 90. *Pawlett v. Heatfield*, ante, 95. *Lawley v. Dibble*, post. 241. *Farrell's* to 414. and the cases there cited. this practice, and in what cases it is at present allowed, see *Tidd's Practice*, 408.

Cafe 308.

The King *against* Haggard.

Certiorari to remove an indictment out of *W. Sussex*, for using a trade not being an apprenticeship.

INDICTMENT at Kirby, in *Westmerland*, on the 5. *Elix.* for using a trade, not having been apprentice thereto seven years; and a *certiorari* was prayed.

BUT THE COURT doubted whether to grant it; because the statute is, that it must be tried in the proper county; so that if it be removed hither, it must be sent down again by *procedenda*, and not filed here, so as to be quashed; but there having been several such *certiorari's* granted, they granted one in this case; and afterwards granted another in a like case in *Trinity Term* following, in the case of one *Woods*, of *Norfolk*.

Temple

Easter Term, 10. Will. 3. In B. R.

Temple *against* Bishop.

Case 309.

IT was held PER CURIAM, That where four took out a bill of *Middlesex*, by the death of one of them the writ abated, and a new writ should have been taken out in the name of the three survivors by journies accounts; and when one of them died, the bill abated, and a new bill should have been taken out in the name of the two survivors only by journies accounts.

Bill of *Middlesex* taken out by four, abates by death of one; and new writ must be taken out by survivors by journies accounts.

Chaloner *against* Claiton.

Case 310.

REPLEVIN. The defendant avowed for rent, that he was possessed of a house for divers years then and yet to come, and that he leased it to the plaintiff from year to year, &c. The plaintiff replied, *nil habuit in tenementis*. The defendant rejoined, *quod satis habuit in tenementis*; and upon demurrer to rejoinder,

Whether in a rejoinder a title must not be set forth. *Quere.*

S. C. 3. Salk. 306.

It was alledged, that the defendant in the rejoinder should have set forth a title.

S. C. Comb. 472.

But NORTHEY for the defendant moved, that there was no necessity so to do; for though in debt for rent, if the defendant plead in bar "*nil habuit in tenementis*," the plaintiff in his replication must shew a title, because in debt for a rent, *the plaintiff is not obliged to shew a title in his declaration, but *quod cum dimisit* is sufficient, yet in an avowry it is otherwise; for in an avowry some kind of title must always be shewn, as was here, *viz.* that he was possessed for divers years then and yet to come; which being done, there is no necessity to set out a title again in the rejoinder (a): whereon the Court took time to consider.

* [189]

And afterwards NORTHEY said, he could not make good the avowry, and therefore prayed leave to amend, paying costs.

Quod CUR. concessit.

(a) See the statute 11. Geo. 2. c. 19. *Sillyvan v. Stradling*, 2. Will. 208. and the case of *Silly v. Dally*, post. 190.

Brag *against* Digby.

Case 311.

CASE on several promises. On original, the defendant, without craving *oyer* of the writ, pleaded a variance between the writ and the count, shewing particularly wherein.

Variance between the writ and count cannot be pleaded without craving *oyer* of the writ. S. C. 2. Salk. 658.

Whereupon the plaintiff demurred; for though the writ be in court, yet it is on a distinct roll from the count; and no advantage can be taken of it, without craving *oyer* (a).

3. Lev. 236.
1. Saund. 118.
6. Mod. 303.
Andr. 76.

Quod CUR. concessit; and a *respondeas ouster* was awarded.

(a) But see 2. Will. 85. 295. *Boats v. Edwards*, Dougl. 227. *Rex v. Amery*, 2. Term Rep. 150.

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Cafe 312.

Carter *against* Shepherd.

By receiving money, and putting it into a bag, the property is altered, and detainue will lie for telling; during which time the fifty pounds in the bag was stolen. **T**ROVER for a goldsmith's note for one hundred pounds. The fact was: Carter had a note of *Shepherd's*; while *Shepherd* was paying him the money, Carter put fifty pounds into his bag of the money, after it was told, and laid it on the counter while the rest was telling; during which time the fifty pounds in the bag was stolen.

THE QUESTION was, Whether *Carter*, by putting the money into the bag, had so appropriated it to himself that he should stand to the loss thereof?

S. C. 5. Mod.

398.

S. C. 1. Salk.

507.

S. C. Comb. 475.

S. C. 1. Ld. Ray.

330.

Hob. 154.

6. Mod. 36.

2. Salk. 442.

3. Lev. 299.

3. Mod. 86.

2. Mod. 23.

And THE COURT held that he should; for the possession of it was the same as if he had put it into his pocket, and he might have detainue for it after it was in his bag.

And accordingly THE COURT ordered, that whereas he had a verdict for one hundred pounds, he should have judgment for one hundred pounds, and make a release for fifty pounds on record.

3. Lev. 299. Ld. Ray. 928. Comy. 138. 3. Bac. Abr. 562.

* [190]

Cafe 313.

Dubarton *against* Chancellor.

Plea in abatement, and judgment thereon, should be entered on the issue-roll. **C**ASE on several promises. Plea in abatement, and *respondens ouster*; *non assumpsit* pleaded, and carried down to trial by *nisi prius*, and verdict for the * plaintiff.

And it was moved, that the entire record was not carried down; for the plea in abatement, and judgment thereon, was not entered on the issue roll, which they ought to have been, and not to have made two rolls; for the plea in bar ought to be entered on the same roll with the plea in abatement; and special verdict.

S. C. 5. Mod.

399.

S. C. Carth. 447.

S. C. 1. Ld. Ray.

329.

5. Mod. 212.

1. Salk. 47. 53.

And for this the verdict was set aside.

3. Bull. 311. Carth. 506. Comb. 393. Dyer, 269.

Cafe 314. The King and Morrice *against* The Mayor and Commonalty of Lincoln.

Quakers may take their solemn affirmation on admission to their freedom.—**M**ANDAMUS to admit *Morrice* to the freedom of the city of *Lincoln*, he having served seven years apprentice; which the mayor refused (*a*); because he refused to take the freeman's oath, —S. C. Carth. 448. S. C. 5. Mod. 402.

(*a*) By 12. Geo. 3. c. 21. "Where any person shall be intitled to be admitted to his freedom, and shall apply to the mayor of the corporation, or other person who is authorized to administer, &c. to be admitted a citizen, burghers, or freeman thereof, and shall give notice specifying the nature of his claim to such mayor or other person, "that if he or they do not admit such person within one month from the time of such notice, the court of king's bench will be applied to for a *mandamus*; if such mayor, &c. shall after such notice refuse or neglect to admit such person, a writ of *mandamus* shall issue to compel such mayor, &c. to admit such person, &c."

he

Easter Term, 10. Will 3. In B. R.

he being a *quaker*, but offered to make his solemn affirmation, according to the late act 7. Will. 3. c. 34. (a). THE KING
AND MORRICE
against
THE MAYOR
AND
COMMONALTY
OF LINCOLN.

And THE COURT were of opinion, that he ought to be admitted on his solemn affirmation; for the office of a freeman is no place of profit, or office in the government, within the statute (b). By his serving his apprenticeship he had a right in the freedom, and his admission, whereunto the taking of an oath is not essential, but only by custom; and the intent of the act was, that, unless in those cases excepted by *proviso*, the affirmation of a quaker should be as available as his oath; and though it was returned in this case, that every freeman had the liberty to run a cow upon the common within the said city, yet that will not alter the case (c).

But because the writ was directed "To the mayor of the city of *Lincoln*, in the county of *Lincoln*," and not "in the county of *Lincoln*," the writ was quashed, there being no such person to whom a *peremptory mandamus* should go. A *mandamus*
quashed for mis-
direction.

(a) Continued by 13. & 14. Will 3. c. 4. and made perpetual by 1. Geo. 1. st. 2. c. 6 — By 8. Geo. 1. c. 6. the several forms in which quakers are required to take the declaration of fidelity, the solemn affirmation, and the oath of aljuration, are described; and by 22. Geo. 2. c. 46. f. 36. it is enacted, "that in all cases where by any statute then made, or thereafter to be made, an oath is required, the solemn affirmation or declaration of the people called quakers shall be allowed and taken instead of such oath, except in criminal cases, or to serve on juries, or to bear any office or place of profit in the Government." (b) LORD MANSFIELD, in the case of *Rex v. March*, recognized the above case as good law; and it is determined, that a quaker may, on his solemn affirmation, be admitted a member of the *Turkey Company*, although by 26. Geo. 2. c. 18. f. 2. it is enacted, that "no person, unless he take the oath therein prescribed, shall be admitted to his freedom in the said Company." 2. Burr. Rep. 1090. (c)

• [191]

Silly against Dally.

Case 315.

REPLEVIN. The defendant makes consuance as bailiff to *J. T.* for that long before *J. T.* grandfather of the present *J. T.* was possessed for five hundred years, commencing from the thirtieth of July 1645 of a certain messuage and fourteen acres called *Treleage*, in the parish of *St. Brago*; and also of another messuage and forty-four acres called *Trequanion*, in the same parish; of which last mentioned tenement the place where is parcel; and that being so possessed, on the first of August 1645, he leased for four hundred and ninety-nine years, three quarters of a year, two months and three weeks, to *A. B.* reserving sixteen pounds *per annum*; that the grandfather, being possessed of this reversion of a term, made his will, and made *J. T.* father of the present *J. T.* and *Jane* his wife, executors jointly, and residuary legatees; that *Jane* died, and *John* survived; that *J.* died, and made the present *J. T.* his executor, as bailiff to whom he made consuance for the sixteen pounds rent arrear. In an avowry, whenever title is made under a particular estate, the commencement of it, and the original whence derived, must be set forth in pleading.
S. C. 2. Salk. 562.
S. C. Comb. 476.
S. C. Cart. 414.
S. C. Holt, 510.
S. C. 1. L. Ray. 337.
S. C. 1. Br. 110.
3. Mod. 121.

P. C. 74. Cro. Car. 138. Yelv. 74. 147. Lutw. 1492. 1497.

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SILLY
against
DALLY.
Ante, 188, 189. The plaintiff demurred, because it was not said how the grandfather was seised, or who made that long lease; and the estate not set out of which the lease is derived; for whensoever the defendant in an avowry sets out a title in a particular estate, he must shew from whom the estate is derived. 1. *Inst.* 303. b. 1. *Cro.* 571. *Scavage v. Hawkins.* *Yelv.* 147. *Witham v. Barker.* 1. *Cro.* 138. *Ske-vill v. Avery.*

PER CURIAM. It is true, that if the lessor bring debt for rent against the lessee or assignee, he need only say *quod cum dimisit*, without shewing his estate; but an avowry is different from a count in this as well as in other cases (a); for if you declare in debt for rent, there one plea goes to the whole declaration, as *nihil debet* does; but no general plea goes to the whole avowry. If in this case you had set forth a seisin in fee in some one who made the lease to J. T. it had been very proper to have traversed the seisin in fee; but instead of a seisin you have alledged a possession; and there never was seen such a traverse as "*absque hoc possessionat. fuit.*" Besides, wheresoever you set forth a particular estate, you must shew the original from whence it is derived; if you have the seisin in fee, it is sufficient to alledge that generally, because that gives him a good title against all men except the disseisee. But now particular estates are not framed by the law, but by contract; and therefore you must shew what that contract is, and how it came to be made; if it is carved out of an estate that is able to support it; and therefore, because the original estate is not set out from whence this particular estate is derived, the avowry is ill.

Vide 2. Cro.
43. 46. 52. 70.
Diversity.

And judgment for the plaintiff (b).

In this case was cited the case of *Harris v. Parker*, 2. *Vent.* 253. 270. which was, Debt for rent on a demise by the plaintiff to the defendant; the defendant pleaded, that the plaintiff "*nihil habuit in tenementis*;" the plaintiff replied, that he was possessed of a lease of forty-one years made to him by the Lord W. who had full power to * demise; and though the judgment was reversed for a fault in the declaration, yet the replication was held good, without setting forth a title; which **HOLT**, *Chief Justice*, said was true; and that in that case it was not necessary to set out a title, for * [192] "*nihil habuit in tenementis*" was the issue; for if the defendant plead, "*nihil habuit in tenementis*," the plaintiff may reply, "*quod satis habuit in tenementis*," viz. in feodo, or any other estate, on

See Chaloner v.
Clayton, ante,
189.

(a) By the statute 11. *Geo.* 2. ch. 19. f. 22. defendants in replevin may avow or make cognizance generally that the plaintiff in replevin, or other tenant of the lands and tenements whereon the distress was made, enjoyed the same under a grant or demise at such a certain rent, during the time wherein the rent distrained for incurred; which rent was then and still remains due; or that the place where the distress was taken was parcel of such cur-

tain tenements held of such tenure, &c.; for which tenements the rent, &c. was at the time of the distress and still remains due; without further setting forth the grant, tenure, demise, or title, of such landlord, &c.

(b) This judgment was affirmed in the House of Lords, 1. *Brown P. C.* 77.—See also *Johns v. Whitney*, 3. *Will.* 65. the same point, and this case of *Silly v. Dally* held to be good law.

the

Easter Term, 10. Will. 3. In B. R.

the trial whereof he may give any other estate in evidence, the alledging any particular estate being only form; the issue being, Whether he had anything in the premises? It was also said by HOLT, Chief Justice, that the case of *Witham v. Barker* (a) was a hard case.

SILLY
against
DALLY.

(a) Yelv. 147.

Oldfield against Sir Richard Raines, Judge of the Consistory Court of the Bishop of Lichfield and Coventry. Case 316.

OLDFIELD was libelled against in the spiritual court *ex officio*, for teaching school contrary to the seventy-seventh canon, anno 1603, which is, "That no man shall teach school except licensed by the bishop, and otherwise qualified as the canon prescribes."

Whether a layman may be sued in the spiritual court for teaching school without licence.

And now Oldfield prayed a prohibition; suggesting, that every man at common law may teach and instruct another; that all canons contrary to the law of the land are void, and do not bind the laity, whereof he is one; that the statute of 1. Jac. 1. and 13. Car. 2. have appointed penalties for keeping schools without licence; and that the exposition of all statutes belongs to the king's courts.

Salk. 672. 330.
Carth. 464.
Comb. 324.

The single question was, How far this canon binds a layman?

Which HOLT, Chief Justice, said was no question to be determined on a motion; and therefore granted a prohibition, and that they declare upon it.

Clerk against Pigot.

Case 317.

IN ASSUMPSIT on a bill of exchange the case was: Dunkin drew a bill of exchange at Bristol on Pigot in London, payable to Clerk or order, at twenty-eight days sight. Clerk living at Bristol sends the bill with Keen to London, with his name indorsed thereon, but a blank space over his name. Keen presents it to Pigot, who accepted it; and * for non-payment Clerk brought this action.

Name indorsed on a bill of exchange may be used as an assignment, or for discharge when paid.

And it was alledged, that the action should have been brought by Keen; because, by Clerk's indorsing his name, the property was transferred from him to Keen.

* [193]
S. C. Salk. 126.

But HOLT, Chief Justice, held (a), that there being a blank space left over the name of Clerk, as is usual in bills of exchange, it was at the election of Keen either to make use of it as his servant or order, If he had filled up the blank space with making it payable to him, as he might have done if he would, then the property of the bill had been transferred to him, and he only could have maintained this

(a) At the Sittings at GUILDHALL, London.

O 4

action

Easter Term, 10. Will. 3. In B. R.

CLERK
against
PIGOT.

action against the acceptor; but seeing he has not filled up the blank space, he thereby declares his intention to have acted only as a servant of Clerk's, whose name was put there, that, on payment thereof, a receipt might be writ for the money over his name; therefore action maintainable by Clerk (a).

(a) See Lucas v. Marsh, in the common pleas, Mich. 10. Geo. 2. in the continuation of 7. Mod. Theed v. Lovel, 2. Stra. 1103. and Kyd on Bills of Exchange, 88 to 109.

Case 318.

Cromwell against Grumdsdale.

If what was the intent of the parties can be understood, the bond is good.

S. C. 5. Mod. 281.

S. C. Salk. 462.

S. C. 1. Ld. Ray.

335.

S. C. Comb. 477.

S. C. 3. Salk. 73.

S. C. Holt, 122.

502.

2. Roll. Abr.

147.

Cio. Jac. 208.

Hob. 19. 116.

119.

Yelv. 65.

2. Jones, 58.

Comb. 60. 86.

187. 226.

Carth. 204.

3. Eac. Abr.

653.

Comp. 148.

DEBT AGAINST THE DEFENDANT as administrator of Roger Urlin for forty pounds, for that the said Roger, on the tenth of July 1674, *per scriptum suum obligatorium, cujus datu est eisdem die et anno supradict. cognovit se teneri et firmiter obligari prefat. Georg. in præd. quadraginta libris, per hæc verba; quadrans libr.* payable on request.

The defendant pleaded, *non est factum prædict. Richardi Urlin.*

The jury find, *quod quidam R. Urlin intest. præd. Grumdsdale* did seal and deliver a certain writing in form of an obligation, *in hæc verba*; by which he obliged himself to the said George Cromwell *per mid. viginti in quadrans lib. bonæ et legalis monetæ Angliæ, ad quam quidem solutionem* he obliged himself, his executors, administrators, and assigns, *firmiter per præsentis sigillo sigillat. dat. primo die Julii, anno regni Regis Carol. Secund. 1674,* conditioned for the payment of twenty pounds twelve shillings on the twenty-fifth of December next ensuing the date thereof, &c. &c.

HOLT, Chief Justice, who delivered the opinion of the Court, said, that the bond was as silly and inartificial as could be; yet the intention of the parties being apparent, the plaintiff must have judgment. As for the *quadrans lib.* if there had been nothing further to explain it, we should have made nothing of it; but the word *quadrans* here being something of four, and it appearing by the condition to be for the payment of twenty pounds, we cannot understand it to be meant of any * other sum than forty pounds; and if the meaning does sufficiently appear, we ought to construe bonds and agreements not according to the strict words, but according to the intention of the parties. "*Sessanta*" is as unintelligible as this; and so is "*quantoginta* (a)." We have searched the rolls of the case of *Dodson v. Key* (b), and find it exactly the same as reported in *Yelv.* 193. As to the "*per mid. viginti*," that is insensible, and therefore cannot hurt. Then as to the *cujus dat.* in the declaration, there is no such date as *anno regni 1674*; it is a void date, and the plaintiff may alledge the deed to be made when he will; and though by the *profert hic in cur.* he has confined himself, yet the *cujus datus* shall be understood of the delivery, and not the date; *cujus datus* shall be the giving of which was, &c.: if it had been *gerent. date*, it might have been otherwise; but here it is good enough.

Therefore judgment was given for the plaintiff.

(a) T. Jones, 48.

(b) S. C. Cas. Jac. 261. S. C. 1. Brownl. 110.

Postea, Mich.
10. Will. 3. Publ.
lign. w. Benson.

Atkinson

Easter Term, 10. Will. 3. In B. R,

Atkinson *against* Cornish,

Case 319.

THE PLAINTIFF brought an action as administratrix of her husband during the minority of her four children *A. B. C. and D.* administrators *cum testamento annexo*; and avers, they were under the age of twenty-one. The defendant pleads, that *A.* the eldest was of full age the first of *October* last. The plaintiff replied, that he was not then of full age; and tendered an issue. The defendant demurred.

And it was objected, that judgment ought to be for the defendant, because the plaintiff did not aver the children were under the age of seventeen (at which time administration *durante minoritate* should cease), but only under the age of twenty-one years.

SED PER CURIAM, The diversity is, if administration be granted *durante minoritate* of an executor, there administration shall cease when the executor comes to seventeen; but if administration be granted *durante minoritate* of one who is not an executor, but only administrator, there administration *durante minori etate* does not cease till twenty-one.

Judgment was given for the plaintiff.

Salk. 33. 5 Co. 29. Fitzg. 163. 1. Vent. 219. Comy. 109. 159. 4. Burn's E. L. 239. 2. Bac. Abr. 382. 3. Bac. Abr. 121. 1. Ld. Ray. 667. Harg. Co. Lit. 89. b. note (6).

S. C. 3. Danv. 356.
S. C. 5. Mod. 395.
S. C. Comb. 475.
S. C. Carth. 446.
S. C. Holt, 43.
S. C. 1. Ld. Ray. 338.
Postea, Mich. 12. Will. 3. Du-
bois v. Trant.
Pasch. 13. Will.
3. Reek v. Tho-
mas.
Cro. Eliz. 609.

TRINITY

TRINITY TERM,

The Tenth of William the Third,

IN

The King's Bench.

Sir John Holt, Knt. Chief Justice.

Sir Thomas Rokeby, Knt.

Sir John Turton, Knt.

Sir Samuel Eyre, Knt.

} *Justices.*

Sir Thomas Trevor, Knt. Attorney General.

John Hawles, Esq. Solicitor General.

• [195]

Case 320.

* The King *against* Kitchner.

Indictment for
enticing away an
apprentice.

INDICTMENT for causing an apprentice to absent himself from his master, and keeping and detaining him in that absence.

6. Mod. 99. 182.

289.

Salk. 380.

Poph. 132.

3. Burr. 1698.

4. Com. Dig.

"Ind. Oment"

(1). Hart v. Aldridge, Cowper, 54.

It was moved to quash it, because it is not a thing of a public nature, being no other than an action on the case.

But THE COURT said it was a great offence, and would not quash it; but left the party to demur if he would.

Case 321.

Williams *against* Drury.

Misnomer may
be pleaded in
abatement,
without laying

a *verdict*.

Ante, p. 125.

1. Saund. 8. 49.

6. Mod. 105.

ASSUMPSIT. The defendant pleaded a *misnomer* in abatement; whereupon the plaintiff demurred, because the defendant had laid no *venue*.

But THE COURT held, that there need not in this case, because it is a plea concerning the person, and so must be tried where the action is brought.

Toms

Trinity Term, 10. Will. 3. In B. R.

Toms *against* Loyd.

Cafe 322.

AN ACTION ON THE CASE for money received to the plaintiff's use. The defendant pleaded his privilege in the exchequer, whereon the plaintiff demurred; and judgment for the defendant; who prayed costs by virtue of 8. & 9. *Will.* 3. c. 11. whereby it is enacted, "that, for preventing frivolous and vexatious suits, if on any demurrer judgment shall be given against the plaintiff, the defendant shall have judgment to recover his * costs." * [196]

Where judgment is for the defendant in a plea in abatement, he shall not have costs.

S. C. 1. *Ld.*

Ray. 336.

S. C. Comb. 482.

S. C. Salk. 194.

Post. 523. 609.

Barnes, 120.

257.

Hullock on

Costs, 149.

But THE COURT were of opinion, that judgment on demurrer, upon a plea in abatement, for the defendant, is not within this act; the intent of the act being only to give the defendant costs where the plaintiff should have had it, if judgment had been given for him. Now if the plaintiff had judgment on demurrer, in a plea in abatement, he has then no costs, though there be some consideration thereof, at the end of the cause, in costs. Besides, the intent of the act is "to prevent frivolous and vexatious suits;" and on judgment for the defendant, on a plea in abatement, it does not appear to the Court that the action is either frivolous or vexatious; so that it must be understood of a demurrer, where there is a judgment final.

Wilkins *against* Mitchell.

Cafe 323.

DEBT FOR RENT in the court of *Cambridge*, where upon the evidence the plaintiff was nonsuited. The defendant had judgment, but THE MAYOR refused to execute the same, taking security from the plaintiff for his indemnity.

Mandamus refused to execute a judgment in an inferior court; it must be by writ *de executione judicii* out of chancery.

Whereon a *mandamus* was moved for, or that THE MAYOR should shew cause why he should not execute the said judgment.

S. C. 3. Salk.

229.

But THE COURT denied the motion, seeing he had a legal remedy (a), viz. a writ *de executione judicii* out of chancery.

(a) See *Rex v. Gray's Inn*, Dougl. Stafford and T. Giffard, 3. Term Rep. 353 to 357. *Rex v. Bishop of Chester*, 647. 1. Term Rep. 396. *Rex v. Marquis of*

Gardner *against* Booth.

Cafe 324.

A PROHIBITION was granted in a suit of tithes, on a suggestion of a *modus*; and consultation was prayed, because they had not proved their suggestion.

On suit for tithes, suggestion of a *modus*; the suggestion must be proved.

And PER CURIAM, Supposing the plaintiff had declared in a prohibition, and the defendant had pleaded thereunto, yet the suggestion, by force of the statute, must be proved within six months. But then the suggestion is entered on the roll, and for that the roll must

S. C. 2. Salk.

548.

Trinity Term, 10. Will. 3. In B. R.

GARDNER
against
BOOTH.

must be brought into court, that it may be seen whether there be a proof thereon or no. After which, it appearing no proof had been made, a consultation was awarded.

* [197]

Cafe 325.

* The King against James.

Certiorari lies in-
to *Wales*.

INDICTMENT in the grand sessions of *Wales*, and *certiorari* granted to remove it, at the prayer of the defendant.

3. Mod. 135.

Stra. 553.

Wilf. 320.

Atk. 75. 182.

3. Term Rep.

654.

But upon this
subject see 4
Hawk. P. C.
7th edit. ch. 27.
f. 25, &c.

And now a *superfedeas* was prayed to the writ; because a *certiorari* does not lie into *Wales*; or if it does, it is only when THE KING directs or desires it, and not at the desire of the defendant.

But THE COURT held that a *certiorari* lies either at the desire of THE KING, or of THE PARTY, according as the Court shall think fit; and accordingly a rule was given for the return of the *certiorari*, and that the indictment should be tried in the next *English* county.

Cafe 326. William Ellis against Grace Ellis, Executrix of John Ellis, the Son of the said William Ellis.

Entered Michaelmas Term, 9. Will. 3. Roll 190.

Infant charge-
able for money
lent to buy ne-
cessaries, if so
laid out.

S. C. Comb. 482.

S. C. 5. Mod.

368.

S. C. 3. Salk.

197.

S. C. 1. Ld.

Ray. 344.

1. Salk. 279 386.

2. Sta. 1083.

4. Bac. Abr.

134.

3. Com. Dig.

"Infant"

(C. 2.).

1. Term Rep. 40.

INDEBITATUS ASSUMPSIT on two promises for one hundred pounds. The defendant pleaded infancy in her testator at the time of the respective promises. The plaintiff replied, *protestando* that he was not an infant at the time of the promises, *pro placito dicit* as to the said two promises, *quod ipse erogabat, extraponebat, et solvebat* 60l. *parcell. inde, et quamlibet parcellam præd. 60l. pro cubiculis, ANGLICE lodgings, pro præfat. JOHANNES ELLIS, et prædict. GRATIA (præd. JOHANNES et præd. GRATIA conj. at. existent.), ac pro emptione necessariorum, et potu, et victu et sustentatione corporum præf. JOHANNIS et præd. GRATIÆ, et familiæ suæ, prædict. JOHANNES ad tunc habente liberos; et hoc paratus est verificare, &c. Et quoad 40l. resid. inde et qualibet parcella præd. quadraginta lib. fuerunt pro emptione necessariorum, &c. et sic præd. 40l. per ipsum WILL. ELLIS præfat. JOHANNI mutuo dat. et accomodat. et per præfatum JOHANNEM ELLIS mutuo habet. et recept. per præfatum JOHANNEM ELLIS expendit. et erogat. et extrapost. fuerunt, &c. et hoc paratus est verificare. Whereon the defendant demurred in law.*

And it was not now questioned, but that an infant shall be chargeable for necessities for his family, as well as for himself; but the great objection to the replication was, that though a man may find necessities for an infant, yet he cannot safely lend money to an infant to provide necessities for himself.

As to which THE COURT were of opinion, that if the infant spend the * money otherwise, then he should not be chargeable; but

* [198]

Trinity Term, 10. Will. 3. In B. R.

but if he lay it out in necessities, according to the lending, as it is averred in the replication he did, then he shall be chargeable; because it is the same as if the lender had bought the necessities for him (a); which employment being traversable, a *venue* should have been laid.

WILLIAM
ELLIS
against
GRACE ELLIS.

For which omission THE COURT gave judgment *quod querens nil capiat per billam*.

(a) See *Earl v. Earl*, 1. Salk. 386. *Harris v. Lee*, 1. Peer Wms. 482.
Darby v. Boucher, 1. Salk. 279. *Mar-* *Fonblanque's Equity*, 68.
low v. Pitfield, 1. Peer Wms. 558.

The King against Dixon and Hollis.

Case 327.

INDICTMENT against two defendants, who were overseers of the highway, for not repairing or causing to be repaired the highways: and it was quashed, because an indictment for not repairing must always be against the parish; the overseers not being bound to repair the ways, but only to give notice to the parish to come and repair them.

Parish to be in-
dicted for not
repairing a high-
way, and not the
overseers.

Anonymous.

Case 328.

A WRIT OF ERROR from the court of common pleas, in an action, was brought here by an attorney, by bill of privilege, and no *plegii de prosequendo* found, and so returned on a *certiorari*; and for that cause judgment was reversed.

judgment re-
versed for want
of bail in error.

The King against Sir Henry Bond, Baronet.

Case 329.

SIR H. BOND brought a writ of error to reverse an outlawry for high treason, and assigned for error, that whereas the statute of 1. Hen. 5. c. 5. doth enact, "that in every indictment, &c. there should be mention made of the true addition of their profession, faculty or mystery, or estate and degree, and that the place of his commorancy should be mentioned;" *unde ex quo* that in the indictment he is not named *Baronet*, nor hath other sufficient addition, *in hoc est erratum*; and so likewise as to the place of his commorancy.

Indictment of
treason is not to
be quashed for
want of addi-
tion, unless the
person takes ad-
vantage of it.
S. C. 1. Ld. Ray.
345.

He assigned also another error in the process of outlawry, viz. the want of a *capias*; which THE ATTORNEY GENERAL confessed; whereon his outlawry was reversed; and being arraigned on the indictment,

S. C. Andr. 146.
2. Roll. Rep.
225.
2. Inst. 670.
Latch, 109.
4. Leon. 121.
Stiles, 26.

HOLT, Chief Justice, said, that Sir Henry Bond had his election, either to take advantage of the exception to the indictment, for want of addition, or waive it, and plead the king's pardon; for the indictment is not to be quashed by the statute, except he take advantage of it.

1. Vent. 338.
4. Hawk. P. C.
ch. 23. l. 123.

And accordingly he waived his exception, and pleaded his pardon.

The

Case 330.

• The King against Robert Fielding.

The statute of 1. Hen. 5. c. 5. of Additions, is a general law, of which the Court will take notice.

See 1. Com. Dig. "Abatement" (E. 22.) (F. 22.) (H. 4.) 5. Com. Dig. "Pleader" (C. 9.).

ROBERT FIELDING was attainted by outlawry for high treason by the name of *R. F. Esquire*, and in Term had his pardon allowed;

And now he brought a writ of error, and assigned for error, that at the time, and before, and after the caption of the indictment, he was known by the name of *Robert Fielding, Yeoman*, and not *Armiger*, as in the indictment.

HOLT, *Chief Justice*, said, it were a better assignment to have recited the statute 1. Hen. 5. c. 15. but however it may be sufficient, that being a general law, and concerning the king, the Court would take notice of it.

A plea, that "the *aforsaid* " *A. did, &c.*" admits the identity of *A.*

But the doubt was, whether he had not estopped himself from taking advantage of that mistake, by his manner of coming in and assigning it, which was, "*et præd. ROB. FIELDING dicit*, that he "is the person mentioned in the record of the indictment;" whether the "*præd.*" did not admit the addition as in the indictment.

DARNELL, SHOWER and NORTHEY, that it admitted no more than identity of the person, and not the truth of the addition; the fallacy of which, as well as the omission, is error.

HOLT, *Chief Justice*. The true answer is, that there could be no estoppel; for the outlawry was returned in *Hilary Term*, in the first year of *William and Mary*, at which time he stood indicted by a wrong addition; but not rendering himself until long after, he had no opportunity to plead it, but could only use the king's pardon, or say "he was not the same person mentioned in the indictment," especially it being confessed by the king's attorney general.

Case 331.

Saunders against Owen.

Custos rotulorum may by parol, without deed, appoint a clerk of the peace.

S. C. 5. Mod.

336.

S. C. 2. Salk.

467.

S. C. 3. Salk. 250.

S. C. Carth. 426.

S. C. Comb. 317.

1. Ld. Ray. 163.

3. Mod. 150. 147.

Noy, 147.

* [200]

ERROR OF A JUDGMENT in the court of common pleas in AN ASSISE of *novel disseisin* brought against him by *Owen*, for the office of CLERK OF THE PEACE of the county of *Kent*; in which assise the plaintiff for title set forth, that the office of the clerk of the peace for the county of *Kent* was an antient office, and that the statute of 1. Will. & Mary, c. 21. enacts, "that the *custos rotulorum*, or other person to whom it belongs to nominate the clerk of the peace, shall appoint one able and sufficient person, residing within the county, to be clerk of the peace, for so long time as the said clerk of the peace shall well demean himself in the said office;" that on the fifteenth of July HENRY Earl of *Winchelsea* appointed him to be clerk of the peace, whereof he was seised *ut de libero tenemento pro termino vite, &c.* until the defendant disseised him.

The

Trinity Term, 10. Will. 3. In B. R.

The defendant pleaded *nul tort nul disseisin*; and upon issue joined,

SAUNDERS
against
OWEN.

A SPECIAL VERDICT was found, that the *Earl of Winchelsea* was *custos rotulorum* of the county of *Kent*; that the office of clerk of the peace was vacant; that, the twelfth of *July*, the *Earl*, by writing under hand and seal, appointed the said *Philip Owen* to be clerk of the peace *durante bene placito* of the said *Earl*; that after the fifteenth of *July*, at the general quarter sessions the said writing was shewn to the justices of peace; that a question arose among them of the validity of the grant, and they refused to admit him; afterwards, at the same sessions held by adjournment at *Canterbury*, by the *Earl of Winchelsea's* orders the said writing was read in court, and then at the same sessions, *absque ulla relatione ad scriptum præd. habita*, the said *Earl* spoke *hæc verba sequentia in his Anglicanis verbis*, "I do nominate and appoint the said *P. Owen* "to be clerk of the peace according to the act of parliament:" and afterwards *Owen* was admitted; then the *Earl* died, and the *Earl of Runney* was made *custos rotulorum*, who granted the said office to *Saunders quamdiu se bene gesserit, &c.*

HOLT, Chief Justice, delivered the opinion of THE COURT, and said, that in this special verdict two points are to be considered:

FIRST, Whether the *custos rotulorum* can by parol, without any deed, appoint a clerk of the peace.

SECONDLY, If he can do so, whether these words of the *custos rotulorum* be a sufficient appointment and nomination.

We are all agreed, that he may appoint a clerk of the peace by parol. But, SECONDLY, that this is not a good appointment by the act.

As to the first appointment by parol, it is good, for it is but an execution of a power, and not a deriving any interest he has in himself. A grant it cannot be, for a grantor ought to have an interest in himself to grant; and the *custos rotulorum* has at most but an interest at will, and the interest of a clerk of the peace is a freehold; and therefore his estate for life, being a greater, cannot be derived out of his interest, which is less; and that the clerk of the peace has a freehold, and is not removeable on the death or removal of the *custos* is not now a question; being so adjudged here in the case of *Harcourt v. Fox* (a), and affirmed in the house of lords. Now if a man be seised in fee of a manor, or of a park, and he make a bailiff, or a keeper for life, this must be by grant and by deed, * because it is an interest derived out of his inheritance; but this is rather like tenant for life, with a power to make leases for three lives; which being in pursuance of a power, there

* [201]

(a) Ante, 42. S. C. 1. Show. 426. Comb. 209. S. C. Show. P. C. 158. 506. 516. S. C. 4. Mod. 167. S. C. S. C. Holt, 189. S. C. 1. Ld. Ray. 161. is

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SAUNDERS
against
OWEN.

is no necessity of livery and seisin, because it is only the execution of an authority; but where a man makes such leases, by virtue of an interest which he has in the land, they are not good without a livery and seisin. So when a man, by virtue of an interest which he has, grants an office for life, it must of necessity be by deed; but if he do it by virtue of an authority only, there needs no deed at all. So if a man devise, that his executors shall sell his lands, they may sell without livery (a), because it is done by virtue of a power, and not by way of conveying any interest from them. It has been objected, that the *custos rotulorum* does not only appoint and nominate the clerk of the peace, but also doth give and grant the said office; because the words of the statute of 37. Hen. 8. c. 1. are, "give and grant the said office;" and the statute of 1. Will. & Mary, c. 21. being made on the foundation of 37. Hen. 8. must be construed agreeably thereunto. But suppose a deed was necessary by the statute of 37. Hen. 8. yet not so by 1. Will. & Mary, c. 21. because by 37. Hen. 8. the estate of the clerk of the peace determined with the interest of the *custos rotulorum*, so that the *custos* granted no more than he could grant. But now by 1. Will. & Mary, c. 21. he grants an interest that shall continue, though he be removed or die. But notwithstanding the words "give and grant," a deed was not necessary, by the 37. Hen. 8. because "give and grant" are general words, and comprehend all manner of dispositions; they are words of surrender, release, and also of limitation and appointment, *secundum subjectam materiam*; and in the 37. Hen. 8. there are the very words "limit and appoint," which shews all their terms to be synonymous, and to mean no other than a nomination and appointment. There is not any law requiring a nomination or appointment to be by deed. A nomination by parol is as much an appointment as by deed. A rent assigned, in lieu of dower, may be by parol, without deed, though it be a freehold created *de novo*; and though a rent lies in grant, because this is not properly a grant, but an appointment. So, in case of partition, if rent be assigned for owelty of partition, if there be three parceners, and rent assigned to two, if it were a grant they would be jointenants, and the rent would survive; whereas, it being but an appointment, if either of them die, the rent shall go to the heir of the deceased, * and not survive. Where corporations have power by prescription to nominate a town-clerk, the constant practice is never to nominate him under the common seal, but only to elect him, yet he has an estate for life, and may maintain an assise for his office. In London indeed it is customary to grant it by deed, but in other corporations not. In *Hunt's Case* (b) where a custom was alledged, that THE LORD ADMIRAL should constitute a registry for and during the term of his life, it was adjudged he might nominate without deed.

(a) Co. Lit. 113.

(b) Dyer, 152.

But

Trinity Term, 10. Will. 3. In B. R.

But as to THE SECOND POINT, which was not much insisted on in the common pleas, we are all of opinion, that this is not a good nomination. The finding the *Earl of Winchelsea's* coming to the sessions was a good inchoation of the nomination; but the words themselves are not sufficient. FIRST, It is not said that he nominated him to be clerk of the peace of the county of *Kent*, there is not one word mentioned of any county whatsoever.—SECONDLY, The words are, “I appoint him to be clerk of the peace according to the act of parliament;” by the act he is, first, to nominate the clerk; secondly, to describe the manner of his execution, by himself or sufficient deputy; thirdly, he is to limit the continuation of his office, *quamdiu se bene gesserit*; all these things are to be done. Now when a man is to do three things together, and he only does part, that is void. Now the nomination of clerk of the peace is but one part of his power. THIRDLY, It is uncertain what act of parliament he meant, for there are two acts relating to the nomination of the clerks of the peace, *viz.* 37. *Hen. 8.* and 1. *Will. & Mary*, c. 21. the one of a nomination at will, and the other to a freehold. FOURTHLY, Though it be found that the words were spoke without any relation to the deed, yet, as they are found, it is impossible but they must refer to the deed; because the words are, that he appointed “the said *Philip Owen*,” and there is no *Philip Owen* mentioned before but in the deed, and in relation thereunto; and if the words refer to the deed, it must be taken to be a declaration of the *Earl's* mind, that what he had done by the deed was according to the act of parliament; but if it must be taken not to relate to the deed, as it is found, then the verdict is insensible and repugnant; because there was no *Philip Owen* mentioned before, to which “the said *Philip Owen*” might have relation. Wherefore we are of opinion that this nomination is void, and that the judgment should be reversed.

SAUNDERS
against
OWEN.

But this judgment was reversed in the house of lords.

* [203]

* Clerk against Mundall (a).

Cafe 332.

INDEBITATUS ASSUMPSIT for wares sold, *non assumpsit* If the party to whose hand a bill of exchange comes, neglect to receive it from the acceptor, he shall not resort to the drawer.
pleaded. At the trial there arose a question concerning a bill of exchange; where *HOLT, Chief Justice*, took this difference, that if the party to whose hands a bill of exchange comes, neglect to receive it from the acceptor, there he shall not resort to the first drawer, because he has relied on the acceptor, the first drawer being only chargeable by custom, or contract in law (b). But a bill, without payment, shall never go in satisfaction of a precedent debt, or contract, except it be part of the contract: as if *A.* sell goods to *B.* and *B.* take a bill in satisfaction thereof; there, though

S. C. Holt, 114. 7. Mod. 139. Show. 156. 2. Salk 442. 2. Will. 353.

S. C. 1. Salk. 724.
S. C. 3. Salk. 68.

(a) This case was at *Nis Prius* at Guildhall. (b) See *Dingwall v. Dunster*, Dougl. 247.

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this

Trinity Term, 10. Will. 3. In B. R.

CLERK
against
MUNDALL.

this bill be never paid, *A.* is discharged, because it is part of his contract that *B.* should take the bill; but otherwise a bill of exchange shall never without payment extinguish or satisfy a precedent debt or contract; and if only part of a bill of exchange be paid, it shall only for that part discharge a precedent contract or debt.

This case was concerning a bill of exchange drawn by one in *England*, payable to the defendant, who indorsed it to the plaintiff, sending it to him for money which he owed him in the way of trade; this was in *June* 1694, which bill was never paid; and the defendant insisted, that seeing the plaintiff had not returned the bill, but kept it a long time in his hand after it became payable, that therefore it should be as so much money paid him.

But *HOLT*, Chief Justice, ruled it to be no payment (*a*).

(*a*) See the *Bank of England v. Newman*, post. 241. *Lambert v. Oakes*, post. 244. *Lord v. Francis*, post. 408.

Case 333.

The King against Shaw.

Appeal from justices must be to the next general sessions, and not next general quarter-sessions.

S. C. 2. Salk. 482.
S. C. Carth. 455.
S. C. Sett. & Rem. 135.

AN ORDER was made by two justices of the peace against *Shaw*, the reputed father of a bastard-child; whereupon he appealed to the next general quarter-sessions of the peace, after he had notice; where the order of the two justices was discharged.

The order of sessions being removed by *certiorari*, it was moved to quash it; because by 18. *Eliz.* c. 3. l. 2. the appeal must be to the next general sessions; and it may be there have been a general sessions before the next general quarter-sessions; as in *London* and *Middlesex* there are four general sessions in the year, besides the quarter-sessions:

Wherefore the order of sessions was quashed (*a*).

(*a*) But the authority of this case is denied; for it is a general rule that every indictment shall be made in support of an order of justices; and therefore if an appeal be made from an order of bastardy

to a general quarter-sessions, the court of king's bench will not intend that a general sessions intervened between the making of the order and the appeal. *Rex v. Chichester*, 3. Term Rep. 496.

MICHAELMAS

MICHAELMAS TERM,

The Tenth of William the Third,

I N

The King's Bench.

Sir John Holt, Knt. Chief Justice.

Sir Thomas Rokeby, Knt.

Sir John Turton, Knt.

* * * * *

} *Justices.*

Sir Thomas Trevor, Knt. Attorney General.

John Hawles, Esq. Solicitor General.

* [204]

* *Brinsby against Gold.*

Case 334.

INDEBITATUS ASSUMPSIT for horse-meat. The defendant pleaded an action depending in the sheriff of London's court for the same cause; and held no plea; because an action depending in an inferior court is no bar to an action in a superior court for the same cause (a).

Action pending in an inferior court, no plea in bar to an action in superior court for the same cause.

(a) See 1. Com. Dig. "Abatement" (H. 24.). 1. Com. Dig. "Action" (K). (L).

Anonymous.

Case 335.

PER HOLT, *Chief Justice.* An action on escape is out of the rule for changing a *venue*.

Memini sapientem idem audivisse a Cur,

Anonymous.

Case 336.

PER HOLT, *Chief Justice.* The plaintiff is not bound to pray a *tales*, but only to bring in the record for trial; if he do not pray a *tales*, the defendant may,

who may pray a *tales*.

Michaelmas Term, 10. Will. 3. In B. R.

Cafe 337.

Pullen against Benson.

Trinity Term, 10. Will 3. Roll 102.

Pleading on a sheriff's bond. **D**EBT ON A SHERIFF'S BOND for appearance, on the twentieth of November, in the ninth year of William the Third, conditioned, that William Benson should appear in the king's bench *die Luna prox. post quinden. Martini Mich. nono Will.*

The defendant pleaded the statute of 23. Hen. 6. and that the bond was delivered by him, on the thirtieth of November, in the ninth year of William the Third; and that William Benson, at the time of the delivery and making of the bond, was taken and arrested by the plaintiff, being sheriff of Yorkshires, by a writ returnable in the king's bench in Michaelmas Term last past; that being so in his custody, he took the said bond from him; *et hoc paratus est verificare.*

Whereupon the plaintiff demurred; and shewed for cause, that * [205] the plea was * double, and wanted a traverse.

And THE WHOLE COURT held the plea to be ill; because when he pleaded the bond to be *primo deliberat.* the thirtieth of November, he should have traversed, *absque hoc* that he delivered the twentieth of November, according to the case of *Green v. Eden (a)*, for here the date was material; for suppose the arrest was before the return of the writ, and after the return of the writ he took an antedated bond, this bond is void; and therefore the date is material, and ought to be traversed.

The date of a bond is the delivery of it. And by HOLT, Chief Justice, The date of the bond is one thing, and the bearing date another; the date of the bond is the delivery of it.

Ante, 194. acc.

Wherefore the plaintiff had judgment.

(a) Yelv. 138. Cro. Jac. 264.— Benjamin v. Howell, 1. Will. 81. See also Leverly v. Pim, 7. Mod. 16. 20. Viner, 342 and 4. Bac. Abr. 79.

Cafe 338.

The King against Richard Rains.

The spiritual court cannot refuse to grant the probate of a will to an executor, because indigent or insolvent, or compel him to give security. **M**ANDAMUS to Sir Richard Rains, judge of the prerogative court, to admit Richard Watts to prove the will of Edith Pinfold.

Sir Richard Rains returned, that Watts was named executor, in trust for three infant children of John Paine deceased, brother of Edith Pinfold; that it appeared, on proof made to him, that the said Richard Watts was very poor, and unable to pay his own debts; and that he absconded himself, whereby the infants and other legatees were in danger of losing their legacies; that in such case, by the ecclesiastical law, the spiritual judge may defer to grant

S. C. ante, 136. S. C. 1. Salk. 499. S. C. Carth. 457. S. C. 3. Salk. 162. 233. S. C. Holt, 310. S. C. 1. Ld. Ray. 361. S. C. 3. Peer. Wms. 337. Stra. 857. Fitzg. 125. 1. Bar. K. B. 280. 1. Black. Rep. 456. 2. Atk. 126. 3. Atk. 566.

probate

Michaelmas Term, 10. Will. 3. In B. R.

probate until such executor give security for payment of legacies, and that *Watts* refused to give security; for which reason he could not admit him, but deferred granting the probate.

THE KING
against
RICHARD
RAINS.

And after divers arguments a *peremptory mandamus* was granted, because the ecclesiastical court cannot demand security. The testator is the proper judge of the qualifications of his executor. Besides, an executor has a temporal interest, and without probate cannot sue. The civil and canon law warrant not any such demand of security; and though there seemed to be some equity in the case, yet the ecclesiastical court is not the proper court for equity here in *England*. Wills are of ecclesiastical cognizance, but not by force of the civil or canon law, but as time out of mind allowed and received here; and if you enlarge the power of ecclesiastical courts, the king's courts may restrain you. If a man make a general executor, they will sue him to account in the spiritual court, but we will prohibit them; because, by the law of *England*, the executor has all the goods of the * testator not disposed of: and this has been the reason of all prohibitions concerning administrators on this account; because, by 3. *Edw. 3.* they are put in the same case with executors. Now in this case, suppose an executor will not give security, what shall become of this will? Can the ordinary adjudge him to die intestate, and grant administration *cum testamento annexo*? An executorship being an office, it is fit he should take an oath for the due execution thereof; but to give a collateral security, to get other men to be bound for him, it is against common right,

* [206]

Vide postea,
Hil. 13 Will. 3.
Blackborough
v. Davis.

Anonymous.

Case 339.

A FINE was set on several defendants, whereas the *postea* was not returned; whereupon the next day, upon motion, the rule for setting the fine was discharged.

Postea must be brought in.

Hill against Vaux.

Case 340.

L I BEL in the spiritual court of *Lincoln* for tithe-milk by a vicar. The defendant alledged a *modus*, and prayed a prohibition. But it appearing on the suggestion, that by this *modus*, during that part of the year in which the *modus* was payable, it gave the vicar no more than a tenth, which by the law he ought to have through the whole year, nor in a more advantageous way, the custom was held void, and a prohibition denied.

A *modus* to pay part of the thing, if the payment is not to be made in a more advantageous manner, is not good.

In the debate of this case a question arose, whether it would have been a good *modus*, if it had been alledged that the delivery had been at the vicarage-house; which depended on this question, whether the parishioner of common right is obliged to deliver his milk-tithes either at the vicarage-house or church-porch, as was adjudged in

S. C. Carth. 461.
S. C. 2. Salk.
656.
S. C. Holt, 672.
S. C. 1. Ld. Ray.
358.
S. C. 6. Mod.
bunb. 307.

261. under the title of *Leicester v. Foy*. Latch, 222. Raym. 277. 1. Mod. 229.

Michaelmas Term, 10. Will. 3. In B. R.

HILL
against
VAUX.

the equity side of the exchequer, in the case of *Dod v. Engleton* (a).

And HOLT, *Chief Justice*, said, that a parishioner is not obliged to do of common right, but only to set them out; and that therefore, if this had been in the *modus*, it would have made it a good one; and that the case of *Dod v. Engleton* was a mere equitable decree, guided by the custom of the neighbouring parishes.

(a) Raym. 277.

* [207]

Case 341.

Pool against Gardner.

IF it do not appear on the proceedings that the spiritual court has not jurisdiction, no prohibition shall go after sentence.

S.C. Carth. 463.
Ante, 132. 135.
Bunb. 81.

2. Inst. 602.
619.

2. Roll. Abr.

318. 1. Salk. 548. 2. Burr. 813. Cowp. 424. 1. Term Rep. 3. 552. Dougl. 378. 363.
2. Term Rep. 473. 6. Com. Dig. "Prohibition" 342. (D.).

ON A MOTION for a prohibition, IT WAS HELD, that where it does not appear in the *libel* or proceedings that the cognizance does not belong to the ecclesiastical court, * there no prohibition shall be granted after sentence.

But where it does appear in the *libel*, or other proceedings, that the cognizance does not belong to the spiritual court, there, after sentence, a prohibition shall be granted in all cases except one; which is, where a man is sued out of the diocese, then if he does not take advantage of it before sentence, he shall not have a prohibition for that cause afterwards, because, though the cause for that reason does not belong to that spiritual court, yet it belongs to a court of that nature, and not to one of the king's courts.

Case 342.

Edward Yard against Ellard.

If a man indebted to a *feme covert* as executrix, promise payment to the husband, the husband must bring action alone.

S. C. 1. Salk.
117.

S. C. Carth. 462.

S. C. 1. Ld. Ray.
368.

1. Black. Rep.
803.

3. Will. 277.
Cro. Jac. 170.

2. Com. Dig.

"Baron and

"Feme" (W.).

ACTION UPON THE CASE, wherein the plaintiff declares, that whereas the defendant, on the sixth of *June*, in the ninth year of *William the Third*, was indebted to the plaintiff and *Susannah* his wife, as executrix of the testament of *S. T.* six pounds for arrears of rent due to *S. T.* in his life-time; and so being indebted, in consideration the said plaintiff would give him time to pay the same until *Michaelmas* then next following, he promised to pay the said six pounds to the said plaintiff at the Feast of *Michaelmas* then next following; and shews, that he gave him time until the then next *Michaelmas*, but that the said defendant has not paid; and avers the life of his wife. And on *non assumpsit* pleaded, and verdict for the plaintiff,

GOLD moved in arrest of judgment, that this action should have been brought by the *baron* and *feme*, because the debt, which was the foundation of the promise, was due to the wife as executrix, and the money, when recovered, would ensue the nature of the debt, and be assets.

But

Michaelmas Term, 10. Will. 3. In B. R.

BUT THE WHOLE COURT held the action was well brought by the husband only, as in the case of *Lea v. Thinne (a)*; and it would have been ill if it had been brought by the wife, because the wife was not privy to the contract; but it is a special promise made to the husband only, to whom the payment is only to be made; and the recovery on this promise must be only by him in his own right; which promise does not alter the debt, because it is not of a higher nature, but is a sort of collateral security; and the money recovered on this promise is no part of the personal estate of the testator; for if the husband die, his executor shall have execution thereof: but yet, when it is recovered, it is a *devastavit* in the husband, so far as he recovers.

EDWARD
YARD-
against
ELLARD.

(a) Yelv. 34.

* [208]

* Savill against Roberts.

Cafe 343.

ERROR OF A JUDGMENT in an action on the case in the court of common pleas, wherein the plaintiff *Roberts* declares, that the defendant, maliciously and wickedly intending to oppress the plaintiff, caused him to be maliciously indicted of a riot; for that he and divers other persons did stop a way whereby the defendant used to carry his tithes; on which indictment he appeared, and was acquitted; by which prosecution he was injured in his name, and put to expences in defending himself. On not guilty pleaded, there was a verdict for the plaintiff, and eleven pounds damages; and judgment for the plaintiff; and on this a writ of error brought.

An action on the case lies for maliciously causing a person to be indicted for a riot, of which he was acquitted by verdict.

S. C. 5. Mod. 394. 405.
S. C. 1. Salk.

THE QUESTION WAS, Whether this action lies for this malicious prosecution, whereby the plaintiff was put to charges and expences; and the court of common pleas were of opinion it did.

13.
S. C. Carth. 416.
S. C. 3. Salk. 16.

HOLT, *Chief Justice*, delivered the opinion of the Court, that judgment ought to be affirmed, that this point, which has been often debated, and of which there had been variety of opinions, might be settled. In order whereunto, it is necessary to consider what are the true grounds and reasons of such actions as these; and it does appear, that there are three sorts of damages, any one of which is sufficient to support this action.

S. C. 1. Ld. Ray. 374.
S. C. Ray. Ent. 396.

FIRST, Damage to his fame, if the matter whereof he be accused be scandalous.

S. C. Holt, 8. 150. 193.
2. Mod. 306.
1. Lev. 53.

SECONDLY, To his person, whereby he is imprisoned.

1. Saund. 228.
5. Mod. 223.
349.

THIRDLY, To his property, whereby he is put to charges and expences.

Stra. 144. 691.
1. Bac. Abr. 61, 62.

The first appears from the case of *Barns v. Constantine (a)*, where it is held, that if an indictment for barratry be preferred,

Bull. N. P. 14.
1. Hawk. P. C. c. 72. f. 2.
1. Bl. Rep. 385.
Douglass 214.

(a) Yelv. 46. Cro. Jac. 32.

P 4

though

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though the indictment be erroneous, or found *ignoramus*, yet an action for the party lies, because it contains matter of scandal; and this was the case of *Sir And. Henly v. Dr. Burfall* (a), where an action upon the case was held good for maliciously indicting the plaintiff, being a justice of peace, for delivering a vagrant out of custody without examination, contrary to law, because it contained matter of slander.

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SECONDLY, If there be loss of liberty: This appears from the statute 21. *Edw. 1. 2. Inst.* 562. *Definit. de Conspirat.* where such are defined to be conspirators "who cause children within age to appeal men of felony, whereby they are imprisoned or sore grieved, &c.;" and it was thought necessary by parliament to give the party satisfaction for such sort of imprisonment; wherefore the statute of *Westminster the Second*, c. 12. enacts, "That the party acquitted in a malicious appeal shall have damages, with respect had to the imprisonment of his body;" but neither of these first two grounds are in this case; wherefore this action must be supported by the third, that is, putting him to charges.

THIRDLY, That a man put to answer an indictment is put to charges is notorious; and if so, it is an injury to his property; and if this injury be occasioned by a malicious prosecution, it is reason and justice he should have an action to repair him the injury: though of late days it has been questioned, yet it has always been allowed formerly; as the 3. *Edw. 3. pl.* 19. 3. *Aff. pl.* 13. 11. *Hen. 7. pl.* 25, 26. *Fitz. N. B.* 116. *Style*, 378. *Atwood v. Manger*. But it may be objected, against the authority of the old Books, that those actions were grounded on a conspiracy, which is of an odious nature; and that without conspiracy they are not maintainable; but to this it is answered, that the conspiracy was nothing in these cases; that was not the ground of these actions, but the damage sustained by the party; for if there be never so great a conspiracy to indict a man, yet if nothing be done in pursuance of that conspiracy, the party can have no action. *The Poulterers Case* (b), and *Smith v. Cranshaw* (c). Now if a man be prosecuted maliciously for a trespass, either with or without a conspiracy, it is the same thing; the trouble and expence is the same; and I take it, that wheresoever an action of conspiracy is maintainable against two, there, if it be a malicious prosecution by one, case will lie. These actions of conspiracy, in the old Books, were really but actions on the case: but conspiracy, properly so called, does not lie unless the party were indicted of a capital crime, *F. N. B.* 116. in which action of conspiracy, properly so called, if it be brought against two, and the one found guilty, and the other acquitted, no judgment can be given against him who is found guilty. 11. *Hen. 7.* 25, 26. 2. *Inst.* 562. 1. *Saund.* 229. And no villainous judgment shall be given, but where a conspiracy was to

1 Cro. 239.

(a) Raym. 180. 1. Vent. 23. 258. S. C. 2. Bulst. 271. S. C. Latch,
(b) 9. Co. 59. S. C. Moor, 813. 79. S. C. Palm. 215. S. C. Cro. Car.
(c) Jones, 93. S. C. 2. Roll. Rep. 15.

*take

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take away a man's life ; and conspiracy, though nothing be done thereupon, is a crime, and punishable at the suit of the king. There has been another objection, and that is the opinion of the Judges in the case of *Sir And. Henly v. Dr. Burstell* (a), who, though they held the action lay in the original case, yet also held, that if a man be indicted of a trespass, or other crime, where there was no * slander, and thereof be acquitted, no such action as this lies, contrary to 7. *Hen. 4.* 31. But that opinion was not material in the case before them ; there was no occasion for them to say it. But so far I confess, If in this case of a riot, there had been only a bill preferred, and the jury had returned an *ignoramus*, no action would have laid, because the matter is not scandalous. The party is not imprisoned, neither suffers he any damage ; for if the jury do not find the bill, he is not injured ; but if he had been imprisoned, the action would lie, though the bill had not been found ; and so in the case of scandal. Whereas it has been objected, that it will be of mischievous consequence, by stopping all prosecutions of this kind ; and there is no more reason in this case of a malicious indictment, than a malicious action ; and no man shall be responsible for any damages whatsoever for suing a writ or prosecuting in the king's courts.

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* [210]

But see *Payne v. Porter*, Cro. Jac. 490. and *Smith v. Hixon*, 2. Stra. 977. *Wicks v. Fearnham*, 4. Term Rep. 248.

But it is to be considered, first, That there is a great difference between bringing an action maliciously and prosecuting an indictment maliciously ; and secondly, that the notion that no action lies for bringing an action maliciously, is not to be taken largely and universally, but with some restrictions : for, first, If a man bring an action, he either claims a right, or complains of an injury ; and the law always allows him to take his course of law to obtain his right, or be satisfied for his injury ; and this is allowed in all courts (b). If a man say to another who is heir at law, and as heir seised of lands, " You are a bastard," these words are actionable ; but if he say, " You are a bastard, " and I am heir to the estate," the addition of these latter words, though false, makes them not actionable, because he claims a right. The law has provided that no man should prosecute without finding pledges ; and that was a security against troublesome actions ; then if the plaintiff's suit be vexatious and groundless, he shall be amerced *pro falso clamore* ; and though these amerciaments be now matters of form, and therefore several acts of parliament have given costs to the defendants, yet we must judge by the reason of the law, as it stood anciently ; but in case of an indictment, there is no provision or remedy but by bringing an action ; but if it appears that the action is brought merely for vexation and oppression, the party grieved in some cases shall have an action upon the case ; he shall not indeed say generally, that he falsely and maliciously, without probable cause, did bring an action, &c. * but if he shew any special matter, whereby it appears to the Court that it was frivolous and vexatious, he shall have an action ; as in the case of

Vide 1. Saund. 132.
Vide 1. Sid. 463.

1. Vent. 86, 87.

* [211]

(a) Ray. 180. S. C. 1. Vent. 23.

(b) 4. Co. 16.

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against
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Daw v. Swaine (a) and **Skinner v. Gunton (b)**. There is another case where an action of this nature will lie, and that is, where a stranger, who is not at all concerned, will excite another to bring an action, whereby he is grieved, an action lies against the exciter. There are other cases where this action is allowed; as **Carlson v. Mills (c)**, **Norris v. Palmer (d)**, and **Ruddock v. Sherman (e)**: but though this action does lie, yet it is an action not to be favoured, and ought not to be maintained without rank and express malice and iniquity. Therefore, if there be no scandal or imprisonment, and *ignoramus* found, no action lies, though the matter be false; yet if the indictment be fairly prosecuted, no action lies: so if the Court has a jurisdiction, though the matter be scandalous, yet if there be no malice, no action lies. But in the case before us, the verdict has found express malice; and therefore judgment ought to be affirmed.

(a) 1. Sid. 424.

(d) 2. Mod. 51.

(b) 1. Saund. 228.

(e) 1. Danv. Abr. 209.

(c) 1. Cro. 291.

Case 344.

Anonymous.

Ejectment.

IF NOTICE in ejectment be given to an under-tenant, and he does not acquaint his landlord therewith, but suffers judgment to go against him, **THE COURT**, upon motion, will not suffer execution to be taken out until the right be tried.

Case 345.

Martin against Gell.

Statute of Additions extends only to process on which outlawry lies.

CASE, by bill for goods sold, against **Francis Gell, Esq.** who pleaded, that he was not **Francis Gell, Esq.** but *merchant*. Whereon the plaintiff demurred; and judgment to answer over; because the statute of Additions extends only to process where outlawry lies, and no outlawry lies on a bill.

* [212]

Case 346.

Jackfon against Pigot.

A promise by the drawee of a bill of exchange, made after it is due, to pay it according to its tenor, is good.

S. C. 1. Salk.

127.

S. C. Carth. 459.

S. C. 1. Ld. Ray.

364.

Dougl. 640.

1. Term Rep.

235.

ASSUMPSIT on a bill of exchange against the acceptor; wherein the plaintiff declares, that one **Dunkin of Bristol**, on the twenty-fifth of *March* 1696, drew a bill of exchange * on the defendant, payable to the plaintiff within a month; that on the sixteenth of *May* 1697, the defendant accepted the bill, and promised to pay *secundum tenorem et effectum billæ*. On *non assumpsit* pleaded, and verdict for the plaintiff,

IT WAS MOVED in arrest of judgment, that the *assumpsit* was impossible, because made a year after the time of payment of the bill to pay the money according to the bill.

But judgment was given for the plaintiff; for it appearing on the declaration, that the acceptance of the bill was after the day of payment,

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payment, the *secundum tenorem et effectum* must be understood to pay the bill presently; but if it had appeared on the declaration that the acceptance was before the day of payment by the bill, there, upon the evidence, an acceptance after would not have maintained the action (a).

JACKSON
against
PAGET.

(a) See *Mitford v. Walcott*, *acc.* post. 410.

The King against The Inhabitants of St. Leonard, Case 347.
Shoreditch.

THE CHURCHWARDENS AND OVERSEERS, and some of the inhabitants of this parish made a poor's rate, which was confirmed by two justices, in which several were not taxed for their personal estates (which was erroneous), but the whole lay on the real estates of the parish; on which several of the inhabitants appealed to the sessions; and they ordered, that the said rate should be annulled, and a new one made. Accordingly the churchwardens made a new rate, both on the real and personal estates; which rate was confirmed by the two justices. But in the new rate there was a great inequality, the real estates being rated in proportion ten times more than the personal; for which several of the inhabitants appealed again to the sessions, where another order was made to discharge the said rate.

The sessions may set aside a poor's rate, and make a new one, or order one to be made by the churchwardens, &c.
S. C. Saik. 483.
524.
S. C. Carth. 464.
S. C. Holt, 508.
573.
S. C. Sett. &
Rem. 258.

And now these two orders of sessions being removed by *certiorari* into this court, it was moved to quash them; because the sessions can only relieve particular persons grieved by the rate, and cannot set aside the whole rate.

SED PER TOTAM CURIAM, Surely the justices at sessions, upon an appeal by particular persons grieved, may, if they see reason, set aside the whole rate; for the statute 43. *Eliz. c. 2. s. 6.* is, "that if any person or persons find themselves aggrieved, it shall be lawful for the justices of the peace, at their general quarter-sessions, to take such order therein as to them shall be thought convenient; and the same to conclude and bind all the said parties." * So that the justices have a large power; and in both these cases, either on the first rate, where the personal estates were *not charged*, or upon the second, where they are *unequally charged*, it is impossible for them to give relief, without setting aside the whole rate; which therefore they may legally do, being empowered by the act to take order herein according to their discretion; by virtue of which, as they may set aside the whole rate, so they may make a new rate themselves, or order the overseers, &c. and churchwardens to make a new one, as was done in this case.

* [213]

Wherefore these two orders were confirmed (a).

(a) See *Rex v. Alresford East*, 2. *Ld. Ray.* 798. *Rex v. Sandwich*, *Dougl.* 562. *Cald.* 105. *Rex v. Maddern*, 1. *Term Rep.* 625. *Rex v. Cheshunt*, 2. *Term Rep.* 623. *Rex v. St. Agnes*, 3. *Term Rep.* 480.

Loveridge

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Cafe 348.

Loveridge *against* Whitrow.

Attachment in *London*.

IN THIS CASE it was ruled, that if *A.* bring debt in *London* against *B.* and attach goods of *B.* in the hands of *C.* from whose possession the goods are not removed, and *B.* by *certiorari* bring the cause into the king's bench, and put in bail, the attachment is at an end, and *C.* ought to deliver the goods to *B.*; which if he do not do, *B.* may have trover or replevin; but the king's bench will not compel him to deliver them, because he is no party in court; and all things now are as if there never had been an attachment.

Cafe 349.

Hawkins *against* Gardner.

Part of a bill of exchange cannot be assigned, so as to intitle the indorsee to an action.

CASE ON A BILL OF EXCHANGE, whereby the defendant promised to pay to *R. A.* or order four hundred and sixty pounds, who indorfed forty-four pounds thereof to the plaintiff; who as indorsee brought this action for the said forty-four pounds, part of the said four hundred and sixty pounds. The defendant pleaded an insufficient plea, and the plaintiff demurred.

S. C. 1. Salk. 65.
S. C. Carth. 466.
S. C. 1. Ld. Ray. 360.
Ante, 72. 84.
Co. Lit. 385. 2.
2. Will. 262.

AND IT WAS HELD, that this personal contract is entire, and cannot be apportioned and multiplied into several actions; so that if *A.* draw a bill of one hundred pounds payable to *B.* or order, *B.* cannot assign fifty pounds thereof, so as his assignee shall have an action for the same; and if *B.* himself bring an action for part, he must acknowledge satisfaction for the residue.

* [214]

Cafe 350.

* Luck *against* Goodwin.

S. C. 2. Salk. 599.
S. C. 1. Ld. Ray. 373.

SCIRE FACIAS. Exception was taken, that whereas it was said, *petis judicium pro misis et custagiis in hac parte*, that it should have been *in ea parte*: but *in hac parte* was held good (*a*).

(*a*) See *Bringar v. Allanson*, 1. Ld. Ray. 532. *accord*.

Cafe 351.

Harrison *against* Cage and his Wife.

Affirmat by a man against a woman, in consideration that he had promised to marry her, she promised to marry him.

ACTION UPON THE CASE, for that in consideration he promised to marry the wife *dum sola*, she promised to marry him; that he frequently offered himself to her to marry her, but that she had not married him, but married the defendant. On not guilty, and verdict for the plaintiff,

S. C. 5. Mod. 411.

IT WAS MOVED *in arrest of judgment*, that there was no consideration; for though an action will lie for a woman against a man

S. C. 1. Salk. 24. S. C. Carth. 467. S. C. Holt, 456. S. C. 1. Ld. Ray. 336. S. C. Ray. Ent. 403. Ante, 97. 101. 121. 1. Roll Abr. 22. 77. 2. Bulst. 48. 6. Mod. 172. 1. Sid. 180. 3. Lev. 65. 2. Salk. 437. 3. Eccl. Abr. 574. 1. Bac. Abr. 285. 1. Com. Dig. 5vo. 203. 211.

for

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for non-performance of his promise to marry her, yet such an action will not lie for a man against a woman.

HARRISON
against
C402
AND HIS WIFE.

Sed tota Cur. contra; because if the woman's promise did not bind her, neither could the man's bind him, because otherwise there would be no consideration for the man's promise; and a promise without a consideration is void: but where there is a promise against a promise, one promise is the consideration of the other, because each may have his action against the other for non-performance. Whereupon the plaintiff had judgment.

And in this case **HOLT, Chief Justice**, held, that if a man making such a promise were incapable to perform by reason of consanguinity, &c. it would be there a void promise, whereof the might discharge herself, by giving special matter in evidence on *non assumpsit* (a).

(a) See *Hutton v. Mansell*, 3. Salk. Fitzg. 275. 275. *Lowe v. Peers*, 26. Holt v. Ward, 2. Stra. 937. 4. Burr. 2225.

Moor against The Manucaptors of Garrett.

Cafe 352.

SCIRE FACIAS AGAINST BAIL, who pleaded, that there was no *capias* against the principal. The plaintiff replied, and set out a *capias prout patet per recordum*. The defendant rejoined, *nul tiel record*. The plaintiff surrejoined, that there was such a record, and prayed a day to bring it in. Whereupon the defendant demurred.

On pleading *nul tiel record*, day is given to bring it in.

S. C. 2. Salk. 566.
S. C. Holt, 558.

HOLT, Chief Justice. This way of pleading is out of the common course. There are two* ways of pleading a record; either by craving *oyer* of the record, and if it is not given it is a failure; or he may plead "*nul tiel record*," and then a day is given to bring it in; but this surrejoinder is a third way, and a new one.

* [215]

But it was adjudged well enough, and the plaintiff had judgment (a).

(a) See *Grant v. Burton*, acc. post. 267. and *Creamer v. Wickett*, cont. post. 352. 1. Term Rep. 150.

Goodwin against Beakbane.

Cafe 353.

IT WAS ADJUDGED in this case, that in a *scire facias* it is sufficient that there be fifteen days inclusive between the *teste* of the writ of the first *scire facias* and the return of the second (a).

Scire facias.
S. C. Carth. 468.
S. C. Salk. 599.
S. C. Holt, 759.

S. C. Comy. 53. 2. Stra. 1139. Cro. Eliz. 738. Skin. 633. 1. Lutw. 26. 6. Md. 146. 4. Bac. Abr. 422. 2. Black Rep. 922.

(a) See *Peale v. Watson*, 2. Bl. Rep. 922.

Rofwell

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VINCENTINE ^{against} of it. Without doubt, any other goods of the person who ought to pay the duty may be distrained; as well as those for which the duty is payable.

Therefore judgment was given for the plaintiff.

Case 358.

Barnes against Geering.

If a declaration is not delivered by the last day of the second Term, the defendant may sign a *non prof.* and is not obliged to receive a declaration.

Gibb. C. P. 40.
3. Bulst. 214.
Cro Jac. 620.
2. Term Rep. 112.
3. Term Rep. 123.
See 1. Tidd's Pract. 223.

BARNES, an attorney of the court, brought debt against the defendant, but did not deliver a declaration against the defendant until after the second Term; but some time after, and before the defendant had signed a *non prof.* he delivered him a declaration, which the defendant refused to receive, and then signed his *non prof.* and the plaintiff signed judgment for want of a plea;

Which was now set aside as irregular; for the course of the Court is, that if a declaration be not delivered by the last day of the second Term, that is on or before it, sitting the Court the last day, the defendant may sign a *non prof.*; and if in such case he do not immediately sign a *non prof.* though he may afterwards receive a declaration, if he will, yet he is not compellable so to do; but he may well refuse it. By an express clause in the statute of Hen. 8. there shall be no costs against an attorney upon nonsuit.

Case 359.

Robert against John Villars, alias Danvers.

In civil actions, the recognizance is entered into by the bail only, and is no estoppel.

FIELDING arrested the defendant in *assumpsit* and *trou- ver*.

The defendant now moved, that he might answer without putting in bail, because he was a peer, viz. *Earl of Buckingham, Viscount Purbeck, and Baron of Stoke*, and so was free from arrest; that if he should put in bail, it must be by the name whereby he is arrested, which would estop him from claiming his peerage.

* [218] SED PER CURIAM, In all civil cases the bail only enter into the recognizance, and not the party himself, and therefore it would be no estoppel to him; that they could not take notice of his peerage otherwise than by plea, which could not be until he was in the custody of the marshal; and therefore being by coercion, it would not prejudice him.

So THE COURT would order nothing, *sed currat lex*.

But HOLT, Chief Justice, said, If this had been a criminal case, they would dispense with his joining in the recognizance to save the estoppel; and that in this they would make the plaintiff declare speedily, and not be allowed the usual time.

The

The King against Beere.

Case 360.

INDICTMENT AGAINST HIM, for that he, designing to subvert the government, did compose, make, write, collect, and had in his custody with an intent to publish, several false and scandalous libels against the king, in one of which *continetur, inter alia, juxta tenorem et ad effectum sequentem*; setting out the words themselves.

Juxta tenorem signifies the words themselves.

S. C. 2. Salk. 417. 646.
S. C. 3. Salk. 226.
S. C. Carth. 407.
S. C. Holt, 422.
S. C. 1. Ld. Ray. 414.
Vide 1. Sid. 219.
5. Mod. 163.
Doug. 184.
3. Term Rep. 429. notis.

On "not guilty" the jury find, that "*quoad descriptionem, et collectionem tantum separatium libellorum in indictamento mentionat. fuit inde culpabilis prout in indictamento supponitur*;" and as to all other things mentioned in the indictment "not guilty."

And after several exceptions in arrest of judgment,

THE COURT delivered their opinions *seriatim* that the indictment was sufficient, and that there was a sufficient crime found in the verdict to charge the defendant.

HOLT, Chief Justice. The objection to the indictment is, that the charge is not certain, but only "*juxta tenorem et ad effectum sequentem*." Supposing it had been "*ad effectum*" only, I should have been of opinion that it had been too uncertain; but "*juxta tenorem*" render it certain enough. *Juxta*, as a preposition, signifies the same as *secundum* in the civil law; and so it does in the common law, as *juxta formam statuti*. So in the case of *Chapman v. Dalton (a)*. Then suppose "*secundum tenorem*" were the words, "*tenor*" signifies the very words, as "*cujus tenor sequitur in hæc verba*." In debt on a bond in the Register, 169. b. in a *certiorari* to remove the transcript of a record or fine, the king signifies that he is willing to be certified *super tenorem finis*; which proves *transcriptum* and *tenorem* to be the same; so that *juxta tenorem* does here signify the very same words themselves, or an exact transcript of the very words; and if, on the trial, the words in the libel had not been exactly * the same with the words in the indictment, the defendant could not have been found guilty. Then if *juxta tenorem* be certain enough, *ad effectum* cannot make them uncertain, for *utile per inutile non vitiatur*. This indeed is not the antient formal way, but introduced of late years; and the first time it was ever debated was in the case of *Ford v. Bennet (b)*, which was a special action on the case, for preferring a scandalous petition against him to King Charles the Second, "*ad tenorem et effectum sequentem*;" and it was ruled on debate to be certain enough; and the same was affirmed afterwards in the exchequer-chamber; and since that there have been several precedents to the same purpose; as *The King v. Fuller (c)*.

* [219]

(a) Plowd. 285. Co. Ent. 116.

(c) Michaelmas Term, 4. Will. 3.

(b) In the King's bench, in Hilary Term, 34. & 35. Car. 2. Roll 1154. 1. Ld. Ray. 415.

Mary, No. 42. 1. Ld. Ray. 509.—See post. 309.

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To copy a libel, knowing it to be a libel, for the purpose of publication, is an indictable offence.

Moor, 627. 813.
9. Co. 59.
2. Salk. 418.
5 Mod. 167.
15. Viner Abr. 87.

Before I come to the objections against the verdict, I shall consider whether it be not criminal to write a libel, though a man be not the composer or contriver thereof; and certainly it is a great and heinous offence: A libel consists not in words and scandalous matter only, for that is not of itself sufficient, though spoken with never so much malice; but it is the putting in writing, or procuring to be put in writing; for if the words are not written, he is not guilty of the libel. A libel, as such, is a specific offence; and it is the writing libellous words and sentences, that makes the offence; and in all cases, where a man does an act, which act causes the thing to be what it is, such a one is to be considered and construed the doer of it; and this rule holds as well in great offences as in small. If *A.* contrive treasonable matter, and dictate it to *B.* and *B.* write it, it is treason in *B.* as well as in *A.* If an act of parliament make a felony, as in case of rape or sodomy, and say nothing of abettors, if *B.* accompany *A.* while he does the fact, and guards the door, *B.* is guilty of felony as well as *A.* though the statute speaks of the principals only (*a*). So in all lower offences procurers are principals; as if *A.* hold *B.* while *C.* beats him, *A.* is guilty of the battery; and it would be very strange, if in this case only, he who contributes as much to the doing of a thing, as he that did it, should be innocent. And whereas *Lamb's Case* (*b*) has been objected; that case must be expounded by the report of the same case in *Moor* (*c*), where it is reported to have been resolved, that the writer of a libel is, in judgment of law, the contriver; and then *Coke's Case*, that he who is convicted of a libel must be contriver, procurer, or publisher, is good law, but otherwise not. But *taking it in its restrained sense, it will not affect this case; for the question was not concerning the writing or making the libel, but about the publication thereof; and they held, that the writing the copy of a libel, as indeed writing the original libel itself, is no publication thereof, but only an evidence of a publication; the question there being, not how far the writing the copy of a libel is criminal, but whether the writing a copy be a publication? which indeed it is not; if there has been a publication of it proved, it is evidence that it was by him that had it in his custody.

* [220]

But it is not criminal to copy a libel, unless it be with intent to circulate the defamation it contains.

Moor, 813.

It has further been objected, that there may be a lawful copy of a libel; as a man may write out a copy of a libel to carry it to a magistrate; a student may take a copy of it at the bar for his instructions; all these things I own may be lawfully done; but then, where a thing abstractedly is unlawful in itself, there must be some other matter to legitimate it, which otherwise would be unlawful; and that must appear to the Court upon evidence, and then the party will not be convicted; besides, if a man lawfully take a copy of a libel in a lawful manner, that is no libel, because it is not *ad infamiam* of the party concerned, which every libel is. 3. Inst. 174. is an apposite case; there *John de Northampton* is

(*a*) 3. Inst. 59.

(*b*) 9. Co. 59.

(*c*) Moor, 813.

charged

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charged with writing only, and not any mention made of publication, and writing only is confessed; but the Court were very tender in their punishment, in regard he was an attorney.

THE KING
against
BARR.

I need not go so far in this case as to give any opinion, whether the writing a copy be a libel or no; for supposing it be not, then it could not have been given in evidence against the defendant, for he is found guilty of writing a libel; that is a conviction of writing an original one, if a copy be not a libel. But indeed I think, that the taking the copy of a libel is a libel, because it comprehends all that is necessary to the making of a libel; it has the same scandalous matter in it, and the same mischievous consequences attending it at first; for it is by this means perpetuated, and it may come into the hands of other men, and be published after the death of the copyer; and if men might take copies with impunity, by the same reason printing of them would be no offence, and then farewell to all government.

To copy the copy of a libel is illegal.

The defendant has had great favour in this verdict; for when a libel is produced, written with the proper hand of a man, and the author of it is not known, this puts the * proof on him; and if he cannot produce the composer, the verdict shall be against him, and shall be as bad as taking one in possession of a horse that is stolen.

Vide tamam
r. Vent. 31.

* [221]

As to THE SECOND OBJECTION against the verdict, that this amounts to an acquittal, because the defendant being charged with the composing, writing, and making, and being found not guilty of the making and composing, he is also found not guilty of the writing, or otherwise the verdict is repugnant and void: As to this it may be answered, that writing is a making, but it is but one sort of making; making is the *genus*, and contriving composing and writing are the *species* of it; then the finding not guilty of all but the writing finds him not guilty of any species of libel but writing; and this notion of libel is as old as the law. Libelling a private man is a moral offence, but when it is against the government it tends to the destruction of it. So it is in the civil law, *Just. Inst. lib. 4. tit. 4. de injuriis*; and I cite this authority because *Bracton, lib. 3. c. 36. f. 155.* seems to have transcribed this sentence from *Justinian*: and therefore judgment ought to be for the king.

On an indictment for "composing, writing, making and making a libel," a verdict of not guilty as to the making and composing, but guilty of writing it, is sufficient.

2. Salk. 660.

TURTON and ROKEBY, *Justices*, were of the same opinion as to the several points relating to the indictment and verdict, and cited some cases to prove that the writing a libel without publishing it was punishable in the star-chamber. *Hob. 62. 121. 215. Pop. 139. 12. Co. 35.*

And afterwards the defendant was fined five hundred marks, and ordered to appear at the sessions at *Exeter*, and to make submission in a form of words to be prescribed him; but the last day of the Term his fine was remitted to one hundred marks.

Cafe 361.

Clayton against Kynaſton.

Two deeds made at the ſame time, not having reference to each other, not to be conſtrued defeaſances.

S. C. poſt. 415. 548.

S. C. Salk. 573. 575.

S. C. 3. Salk. 298.

S. C. Holt, 178. 218.

S. C. 1. Ld. Ray. 419.

Cro. Car. 426.

Cro. Jac. 300. 423.

1. Lev. 272.

* [222]

CLAYTON, executor of *William Winterſhall*, brought covenant againſt *Edward Kynaſton*, and the plaintiff declared on articles of agreement, the tenth of *May 1676*, between *Killigrew*, *Kynaſton* and others the king's players on one part, and *Winterſhall* on the other; wherein "it was jointly and ſeverally agreed, that if the ſaid *William Winterſhall* ſhould be minded to leave off acting, and give notice thereof in writing, &c. that he ſhould have five ſhillings allowed him every acting day, &c." And if the ſaid *William Winterſhall* ſhould happen to die before ſuch notice in writing, that then one hundred pounds ſhould be paid to his executor within ſix months after his death, provided that ſuch notice ſhould not be given but in an acting week." The plaintiff affirms for breach, that *Winterſhall* * after the making of the indenture aforeſaid died at *London*, the ſeventh of *July 1679*, and that the hundred pounds was not paid within the ſix months after his death. The defendant pleaded, that at the time of making of the aforeſaid indenture, another indenture was made between the ſaid *Winterſhall* and *Thomas Killigrew* on the one part, and *Edward Kynaſton* on the other part; whereby "it was jointly and ſeverally agreed, that if, &c." ſetting out *verbatim* the ſame covenants and agreements as in the former indentures, "the ſaid *Kynaſton* ſhould have a mind to leave off acting, he ſhould be diſcharged from all debts, ſums of money, contracts and promiſes for the uſe of the ſociety, or concerning the ſame, &c." And then he ſaith, that two years before the death of *William Winterſhall* he gave notice, according to the covenant, of his intention to leave off acting, and accordingly two years before *Winterſhall*'s death left off acting, whereby he became diſcharged from the ſaid covenant, and from paying the hundred pounds, and prays judgment. And thereon the plaintiff demurred.

HOLT, *Chief Juſtice*, delivered the judgment of the Court, that the deed pleaded by the defendant was no defeaſance of the deed declared on by the plaintiff, becauſe both the deeds were made at one and the ſame time. It can never be the intention of the parties that they ſhould defeat each other, and one deed has no reference to the other, as in all thoſe caſes that have been conſtrued to be defeaſances; for if *Kynaſton* by deſiſting ſhall be diſcharged of his covenant, *Winterſhall*'s ſecurity would be very much diminiſhed, if not totally deſtroyed, and it may be the ſeveral remedy is alſo: For where two are jointly and ſeverally bound in a bond, a releaſe to one diſcharges the other. But he ſaid he would not give any opinion what the law would be in ſuch caſe, in the caſe of covenant; but that the joint remedy is deſtroyed, is without doubt; and certainly it could never be the intent of the parties that the deed ſhould be void as ſoon as it was made. But if *A.* be obliged to *B.* and then *B.* reciting the obligation covenants to ſave him harmleſs abſolutely or upon contingency, this amounts to

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an absolute defeasance in one case, and after the contingency happens in the other case, to prevent circuity of action; but here is no relation between the two deeds, and the words of the covenant are "to be discharged and saved harmless absolutely, or upon a contingency, &c. before made, or afterwards to be made;" but no mention is made of security given at the same time; 'besides that, the intent of the parties was that they should be mutual securities; and therefore one * deed could not be a defeasance to the other.

CLAYTON
against
KYNASTON.

* [223]

And judgment was given for the plaintiff,

The King against Gall.

Case 362.

HOLT, Chief Justice, delivered the opinion of ten of the Judges, who met at Serjeants Inn upon some questions upon the statute 21. Jac. 1. c. 4.

The 21. Jac. 1. c. 4. does not extend to subsequent statutes.

FIRST, That that statute does not extend to any offence newly created by any statute made since; so that subsequent penal statutes are not restrained thereby (a).

SECONDLY, That no action of debt lies on the statute 5. Eliz. c. 4. or any penal statute by a common informer in a foreign county, but is taken away by the statute of 21. Jac. 1. c. 4. but if the fact was committed in the county where the king's bench sits, then it may be brought in the king's bench, but not otherwise (b); and he denied the case of *Barnes v. Hughes* (c) to be law.

All popular actions and prosecutions on penal statutes before 21. Jac. 1. c. 4. must be in the county where the fact was committed. S. C. Holt, 163. See 4. Hawk. P. C. ch. 26. page 110 to 115.

And per HOLT, Chief Justice, ROKEBY and TURTON, Justices, if a subsequent act be made that gives a popular action, you must in debt lay it in the proper county; and though the party go out of the county, you may proceed against him by outlawry.

(a) See Hicks' Case, 1. Salk. 372. and Shipman v. Henbest, 4. Term Rep. 109.

(b) NOTE, In Michaelmas Term, 2. Queen Anne, a judgment was given in

the common pleas pursuant to this resolution on the statute 5. Eliz. Vide ante, 31. and Hob. 327. acc.; Salk. 373. Carth. 465. 3. Lev. 71. com. (c) 1. Sid. 400. 1. Vent. 8.

Heylin against Hastings.

Case 363.

INDEBITATUS ASSUMPSIT by an executor, for goods and wares sold and delivered by his testator. The defendant pleaded *non assumpsit infra sex annos*, and the proof on the trial was, that the goods were sold and delivered above six years before the action brought, viz. in the year 1686, after which the plaintiff's testator died; and in the year 1695, the plaintiff delivered the defendant a bill of the said goods. The defendant denied that he

A promise to an executor in these words, "Prove the debt" and "I will pay" "you," will avoid the statute of Limitations.

435. S. C. 1. Salk. 29. S. C. Carth. 470. S. C. Holt, 427. S. C. Comy. 54. Ray. 389. Gilb. L. E. 178. 2. Ld. Ray. 1101. Bull. N. P. 148. 3. Bag. Abs. 517. Comp. 548. Dougl. 629. 2. Burr. 1099. 2. Term Rep. 760.

S. C. 5. Mod.

S. C. 1. Ld.

had

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HEVLIN
against
HASTINGS.

had them, but said, "Prove it, and I will pay you;" and now on this trial the plaintiff proved that the defendant had the goods.

The question was, Whether this might be given in evidence on this general declaration, and whether this promise brought the party out of the statute of Limitations?

A CASE being made and advice had thereon, all the Judges at *Serjeants Inn*, except *LECHMERE*, as *HOLT*, *Chief Justice*, declared, were of opinion, that this special promise of the defendant amounted to a waiver of the statute of Limitations, and that this matter might well be given in evidence on this general declaration; and that proof of the delivery of the goods was to be made on the trial in this action, it being no more than if he had said, "If I had the goods, I will pay for them."

* [224]

HOLT, *Chief Justice*, likewise declared, that all the Judges were of opinion, that a bare *acknowledgment* of the debt does not amount to a new promise (a); which

ROKEBY, *Justice*, compared to the case of trover and conversion, where demand and refusal is evidence of a conversion, but not a conversion itself.

(a) But it is now settled, that an *acknowledgment* of a debt will avoid the statute, *Yea v. Fouraker*, 2. Burr. 1099. although such acknowledgment be not in direct terms, Bull. N. P. 149. See also 2. Vent. 151. Prec. Chan. 385. Cowp. 548. Dougl. 651. and *Austin v. Baker*, post. 250. *notis*.

Case 364.

The King against Duncomb.

Amendment.

THE ATTORNEY-GENERAL moved for leave to amend an information against *Duncomb*, wherein the name of a commissioner of excise was mistaken; and granted.

A jury cannot be struck by the master in capital cases.

And that THE MASTER might strike a jury by consent; which was also granted, being only a case of *misdemeanor*; but not in capital cases, for then the prisoner would lose his challenges; and it was never asked to plead upon mending information. In case of *misdemeanor* THE CORONER returns forty-eight, but not in capital cases.

Case 365.

Bridget Baily's Case.

Service for one entire year tho' by different contracts, is a good service for a year.

S. C. 3. Salk. 257. S. C. Sett. & Rem. 357.

BRIDGET BAILY, before the twenty-fifth of *March* 1695, was a settled inhabitant in the parish of *Ouerton* in *Hampshire*; and then, about the said twenty-fifth of *March*, she contracted with *John Orpwood* of *Steventon*, for twenty shillings, to serve him from the said twenty-fifth of *March* to the *Michaelmas* following, which she accordingly did; and then she made a new contract with him to serve him for a longer time, by virtue of which she served him for a longer time, from *Michaelmas* until the *April* following.

AND

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AND IT WAS HELD, that though there was not an entire contract for a twelvemonth, yet there being a service for a twelvemonth it gained her a settlement, according to the 9. Will. 3. c. 30. (a).

BRIDGET
BAILY'S CASE.

(a) See Mr. Conft's Poor Laws, 2. vol. page 415 to 454.

Anonymous.

Case 366.

IT was moved for leave to file an information against the mayor and common-council of *Hertford* in the name of *Sir Samuel Ashtree*, to know by what warrant they admitted foreigners and strangers to the freedom of the *town, alledging that this was no *quo warranto* in the name or at the prosecution of the king, but only a method to try a right, whether the mayor and common-council could, contrary to the exprefs words of the charter, as it appeared, admit those to the freedom of the town who were strangers and not inhabitants therein, and produced four or five precedents in the time of *King Charles the First*.

Judgment on an information in nature of a *quo warranto* is only final if against the defendant.

* [225]

See 9. Ann. c. 20.

And after several motions THE COURT gave leave to file an information, because the injured freemen of the town could have no other way to remedy themselves, or to try their right.

In this case *HOLT, Chief Justice*, said, that a *quo warranto* was in the nature of a writ of right, to which the defendant can have no plea but to justify or disclaim, and cannot plead not guilty; and that judgment both for and against the king is final. But the judgment in an information in nature of *quo warranto*, if against the defendant, is final, but not if against the king; and that in this case the right is in the corporation, and the execution only in the mayor and aldermen. Vide 1. Sid. 86. 9. Co. 28. a. 2. Inst. 282.

Coot against Lynch.

Case 367.

JUDGMENT was given for the plaintiff in *Ireland*, and costs were taxed, and error was brought in the king's bench here (a), and judgment affirmed, and costs taxed; and afterwards a writ of error was brought in the parliament here, and the judgment affirmed, and a *capias* sued against the defendant for all costs given here.

On the judgment affirmed in B. R. on writ of error out of *Ireland*, execution must be by writ in *Ireland*.

And, after several arguments and consideration of the Court, the execution was set aside; for it was said by *HOLT, Chief Justice*, that in this case one could not have a *capias* in any county of *England*, because the cause of action arose in *Ireland*, and there the venue is laid, and therefore the original *capias* ought to issue in

S. C. 5. Mod. 421.
S. C. Salk. 321.
S. C. Carth. 460.
S. C. Holt, 372.

S. C. 1. Ld. Ray. 472. S. C. Lilly Ent. 225. 271. Ray. 427. Yelv. 118. Cro. Jac. 2. Bac. Abr. 357. Cowp. 535.

(a) See 6. Geo. 1. c. 5. and 22. Geo. 3. c. 53.

Q 4

Ireland,

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Ireland, but no *capias* could issue out of the king's bench in *Ireland*, and therefore not here; neither an original *capias*, nor a *testatum capias*; but the method is to issue out a writ reciting all the proceedings here, directed to the Chief Justice of the king's bench in *Ireland*, and there execution shall be sued out for all (for though the judgment be affirmed here, yet the law supposes the party commorant in *Ireland*), for the costs are but accessory to the judgment; and such mandatory writ determines the writ of error here, and restores the cause in *Ireland* (a).

* [226] And it was also said by HOLT, *Chief Justice*, that it is the true record which comes here out of *Ireland*, and not the transcript; but when it comes here it is the true record, and not * before, and that which is in *Ireland* ceases to be a record. And so it is of a record of the common pleas that comes hither by writ of error.

(a) Post Mich. 11. Will. 3. Dillon v. Walcott, Cro. Car 511. Bp. Offory contra.

Cafe 368. The King against Fell, Keeper of Newgate.

An indictment
against the
keeper of New-
gate for the
escape of a per-
son in his cus-
tody *pro aliâ pro-*
ditione, ill, not
saying he was
committed for
it.

FELL was indicted for the escape of *Berkenhead*, who was committed for high treason in conspiring the death of the king. Upon not guilty pleaded, and verdict against the defendant,

IT WAS MOVED in *arrest of judgment*, that the indictment was only, that *Fell* suffered *Berkenhead* to escape, being in his custody *pro aliâ proditione prædictâ*. and did not shew that he was committed for high treason to the custody of the defendant.

And for this exception judgment was arrested; for it was said by HOLT, *Chief Justice*, that he might be in custody for debt, riot, &c. and another might go before a secretary of state or justice of peace, and swear high treason against him, in that case he is in custody of *Fell* charged with high treason; but because he was not committed to *Fell* for high treason, he shall not answer for his escape as for the escape of one committed for high treason: the precedents are *cujus ex causâ commissus fuit*,

211.
Comb. 114. 295.

ANOTHER OBJECTION was, that it was said, that *Berkenhead* was committed *prisonæ de Newgate sub custodiâ vic.* whereby it did not appear that he was committed to the custody of *Fell*; and that to say he was committed *prisonæ* was insensible, for he cannot be committed to a place but to a person, &c.

As to the first part of the objection, it was held well enough; for if *B.* be committed to the sheriff, and the gaoler lets him escape, the gaoler is liable; and though some doubt has been made whether the sheriff be liable in such case,

Yet by HOLT, *Chief Justice*, without doubt he is, for by the 14. *Edw. 3. c. 10.* the sheriff is to put in such keepers for whom he will answer; and the 19. *Hen. 7. c. 10.* which restores the
gaols

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gaols to the sheriff, says, that he shall be answerable for the escapes where the gaol belongs to him (a).

THE KING
against
FELL.

As to the other part of the objection, HOLT, Chief Justice, said, that "*commissus fuit prisonæ*," or "*Turri London.*" was good; and so were the precedents.

But for the first objection judgment was arrested.

* [227]

* Another indictment was against him for the escape of one *Wray*, convicted of a misdemeanor for attempting to counterfeit chequer bills (b); and after judgment that he should stand in the pillory, the sheriff out of favour delayed the execution beyond the usual time, and in that time *Wray* escaped; and on the indictment, *Fell*, being found guilty, was now in court to be fined.

The sheriff cannot delay the punishment of an offender beyond the usual time.

HOLT, Chief Justice. In this case the sheriff ought to be prosecuted and fined grievously, for the judgment ought to be executed in convenient time, and the sheriff's respiting it is an affront to the justice of the nation; but however that is no excuse to *Fell*.

If here *Fell* had retaken the malefactor before an indictment found against him for the escape, he ought not afterwards to be troubled for the escape.

If a person convicted of a misdemeanor escape, and is retaken before the gaoler is indicted for it,

And he was fined forty marks.

he shall not be troubled for the escape.—*Vide* 3. Co. 52. b. *simile*.

(a) See *Sanderfon v. Baker*, 3. Will. 326. *Woodgate v. Knatchbull*, 2. Term Rep. 148. 156.

benefit of clergy by 9. Geo. 1. c. 32. and 25. Geo. 3. c. 2. See 2. Hawk. P. C. 7th edit. ch. 51. f. 33.

(b) This is now felony without the

Ward against Everard.

Case 369.

Hilary Term 7. Will. 3. Roll 718.

IN REPLEVIN the defendant avowed as bailiff to *Carina* and *Elizabeth Cromwell*, for that *Sir Robert Carr* was seised in fee of the place where, &c. and being so seised, granted an annuity or annual rent of one hundred pounds to *Carina*, *Elizabeth*, *Anne*, *Mary*, and *Esther Cromwell*, during their lives, and the life of the survivor, to be equally divided between them, viz. twenty pounds for each of them during their lives, and after the death of the first of them, that her part should be equally divided among the survivors; and then follows the same limitation, if the second and third die; but when it comes to the two last, there is no limitation of the survivorship between them. That *Carina* and *Elizabeth* were the two survivors, and for rent arrear, as bailiff to them, the defendant avows, &c. The plaintiff in bar of the avowry pleads, that by an act of parliament all conveyances made by *Sir R. Carr*, made before April 1630, were made void; and that this

"Equally to be divided" will not make a tenancy in common in a deed, as it does in a will.

S. C. Comb. 329. S. C. Carth. 340. S. C. Salk. 390. S. C. 5. Mod. 25. S. C. Holt, 368. S. C. 1. Ld. Ray. 422. 1. Sid. 157. 2. Salk. 423.

Comb. 329. Cowp. 660. 1. Peer Wms. 96. 1. Bro. P. C. 189. conveyance

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WARD
against
EVERARD.

conveyance was such. Upon issue joined, a verdict was found for the avowant.

AND IT WAS MOVED *in arrest of judgment*, that the avowry was ill, because by the grant the grantees were tenants in common of this rent, and therefore could not join in the avowry, but should avow severally.

And it was adjudged *PER CURIAM*, that they were jointenants; for when *Sir Robert Carr* had granted an annuity to five, the
 * [228] * words "equally to be divided" shall not make a tenancy in common in a deed, and the limitation of twenty pounds a-piece is only by way of distribution, and not severing the grant; and they compared it to *Knight's Case (a)*, where it is held, that the rent issues out of the entirety, and the "*viz.* ten pounds for one," &c. was only an indication of the several values and rates of the land demised; for when the grantor had granted one rent of one hundred pounds to five, it is repugnant afterwards to make it a several rent of twenty pounds a-piece; as if one grant two acres to two, *habendum* one acre to one, and the other acre to the other. So a rent granted to two copyholders by a third, of twenty pounds, *viz.* ten pounds to one, and ten pounds to the other, makes it not a tenancy in common (*b*); so here a limitation of twenty pounds to each makes it not a tenancy in common (*c*); and if it were a tenancy in common, the avowry of each of them should be *pro quinta parte* of one hundred pounds, and not for twenty pounds,

Quoted in this case, 1. In. 189. Litt. f. 208. 2. Roll. Abr. 90. Style, 211. Yelv, 1. Inst. 180. 1. Cro. 74. Dyer, 361. Cro. Eliz. 25. 1. Saund. 282.

And judgment was given for the avowant.

(a) 5. Co. 55. and see post. *Fisher v. Wiggs*.

(b) Co. Lit. 169.

(c) See Hob. 173.

Case 570.

The Attorney-General against Buckley (a).

In an information, if, after verdict, the defendant dies before the day in bank, it is a discontinuance.

AN INFORMATION in the exchequer by the attorney-general against the defendant, and a verdict was given against the defendant; after verdict, and before the day in bank, the defendant died;

And the question was, Whether this information was within the statute 17. Car. 2. c. 8. which enacts, "that in all actions real and personal, or mixt, the death of either party between verdict and judgment shall not be alledged for error, so as such judgment be entered within two Terms after such verdict?"

And upon solemn argument by WARD, POWYS, and HATSELL, (*LECHMERE absent*) it was held, that an information was not within the word "action," nor the king within the word "party;" and that it was never said "the death," but "the demise" of the king.

And adjudged that the information should be discontinued.

(a) In the Court of Exchequer.

Lee

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Lee against Daniel.

Case 371.

PER HOLT, *Chief Justice*, the disposal of seats in the mother-church belongs to THE ORDINARY, and so of seats in a chapel of ease belonging to the mother-church; and to know whether it be a church or not, is by knowing whether it has *baptisterium et sepulturam*, Disposal of seats in the church belongs to the ordinary. Postea, 233.

* [229]

* Anonymous.

Case 372.

PER HOLT, *Chief Justice*, A record of a judgment is defeasible by bond or deed. Defeasance.

The King against Lewis.

Case 373.

AN INDICTMENT wanted the words "*in com.*" and upon motion THE COURT would not amend it, but *secus* upon an information. Indictment wanting in com. not amended.

NOTE, It is matter of substance.

Anonymous (a).

Case 374.

THE CASE, as TREBY, *Chief Justice*, opened it in his argument, which I only heard, the rest having argued before I came, was thus: An *assumpsit* was brought by an executor, upon a promise to his testator; upon *non assumpsit infra sex annos* pleaded, the plaintiff replied, that his testator took out a writ against the defendant within the six years, and died during the pleader, making him his executor; and that he brought this writ *per dietas computatas*: to which the defendant demurred. And he held with his Brothers, that this writ did not lie for an executor upon abatement of his testator's writ; and the nature of this writ is to recontinue a former writ, with this addition, that it may be amended for false *Latin*, or the like (b). It must be the same plaintiff that brings it, and therefore it lies not for an executor, administrator, or heir (c). The Court was of opinion it would not lie; yet there were frequent occasions for executors and heirs to revive their ancestors, &c. writs, and yet we find no instance of it; and then *Littleton's* argument will hold, *Jenkenson*, f. 3. pl. 7. 6. Co. 10. 7. Edw. 4. *Mark Ocle's Case*. Br. *Journeys Accompt*, 33. *Kelw.* 411. 1. Vent. 235. It was objected, that there is no case where the act of God or of the law shall take away a man's right. But there are many; before the statute *De Bonis Asportat.* in all cases where damages only were to be recovered, the executor was

(a) In the Court of Common Pleas.

(c) *Rast. Ent.* 417. 107. Cro. Eliz.

(b) *Cotton's Abr.* 34. *Edw.* 3.

174.

without

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ANONYMOUS. without remedy; and a pawn is not redeemable after the death of the party that did pawn. *A.* is murdered, and the next heir brings his appeal, and dies, the appeal is gone for ever (*a*). In *Journeys Accompts* you shall never change your count; and * the old way of *Journeys Accompts* was to pray a new writ, and then to proceed on the former roll; *dieta* is *iter unius diei* (*b*). If by the custom a copyholder may only make a lease for one year, and he is licensed to make for ninety-nine years; and it was doubted whether he could assign his license, or make an under-lease; and held he might; because the lord's interest was bound for ninety-nine years.

* [230]

(*a*) 27. Hen. 6. pl. 64, 65. 14. Hen. 6. (b) 1. Roll. Abr. 590. pl. 7.

Cafe 375.

Anonymous.

A person authorized to sell is impliedly authorized to receive the money.

PER HOLT, Chief Justice. He who has power to sell, has power to receive the money; for if a man give power to his servant to sell his horse, he impliedly gives him power to receive the money; and payment to such servant is payment to the owner.

Cafe 376.

Bidolph against Bruce.

Admiralty.
1. Com. Dig.
"Admiralty"
(E. 15.).
2. Willf. 264.

PROHIBITION nisi cause was granted to the court of admiralty for libelling there for seamen's wages; it appearing on the libel, that the service was all in the river Thames.

Cafe 377.

Anonymous.

On a *capias*, the sheriff has no power to receive the money.

HOLT, Chief Justice. A sheriff has no power to receive money from the defendant upon a *capias*, for his business is only to execute his writ; and if, in such case, a defendant pay the sheriff, and he afterwards become insolvent, and do not pay the plaintiff, such payment shall not excuse the defendant: and if a sheriff suffer one in execution to escape, the plaintiff has his election to sue the sheriff upon an escape, or else the defendant: but he cannot have a *capias* against the defendant without a *scire facias*.

Cafe 378.

Anonymous.

The Court will not discontinue an action on a suggestion of the attorney's absence.

IT WAS MOVED to discontinue a former action pleaded in abatement of a subsequent one, upon suggestion that the attorney in the former action was not to be found.

HOLT, Chief Justice, would not allow it, but bid them plead *nil tiel record*, and that the defendant would find their attorney for them: and he held, that one could not plead twice in abatement.

Coxeter

* *Coxeter against Parson.*

Cafe 379.

HE was libelled against in the spiritual court for calling a clergyman "a blockhead," and saying that "he wondered a bishop would hold his hand over him," and that "he deserved to have his gown pulled about his ears."

Prohibition to spiritual court on suit there for calling a clergyman "block-head."

And a prohibition was moved for, and 2. *Roll. Abr.* 295, 296. was cited.

S. C. 7. Mod. 31.
S. C. Salt. 699.
S. C. 1. Ld. Ray. 423.
2. Lev. 41.

HOLT, *Chief Justice*, said, he had known a prohibition denied to stay a suit for calling a parson "a knave (a)"; but here they cannot punish one in the spiritual court for being a blockhead; and to call a justice of peace "a fool, a blockhead, and a buffle-headed justice," is not actionable.

And a prohibition was granted.

(a) *Nelson v. The Dean of Chichester*, ante, 104.

Anonymous.

Cafe 380.

AT A TRIAL AT BAR, an answer in chancery, though not sworn, was given in evidence; because it was proved to have been filed in the Six Clerks office.

Answer in chancery filed in the Six Clerks office, evidence.

Anonymous.

Cafe 381.

PER CURIAM. If a declaration be delivered the day before the last day of a Term, the defendant has two days in the next Term to put in an answer; for he ought to have four days in Term.

On a declaration delivered the day before the last of the Term, the defendant

has two days in next Term to answer.

Anonymous.

Cafe 382.

HOLT, *Chief Justice*. In all actions upon a penal statute common bail suffices; but when a writ is special, there cannot be common bail, without summoning before a Judge.

In actions on penal statutes common bail suffices.

Anonymous.

Cafe 383.

UPON a *scire facias quare executio non*, the plaintiff in error may assign error; but if he do not, the judgment is only, that execution be awarded, and not that judgment be affirmed (a).

Scire facias quare executio non.

(a) See *Wicket v. Foot*, post. 241.

Anonymous.

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Cafe 384.

Anonymous.

Indictments,
some sorts
quashed on mo-
tion.

IT was said by SIR SAMUEL ASHTREE, that indictments for perjury, forgery, maintenance, were never quashed on motion (a), but the party is always put to plead to them; but as to riots, or other offences of a public nature, the Court indeed is very tender of quashing them, yet they do it daily, if they find it for a frivolous matter.

(a) Rex v. Flint, post. 142.

* [232]

Cafe 385.

* Coot against Berty.

In an action of dower, if elopement be pleaded, a replication that it was by licence of the husband, is bad.

IN DOWER, the defendant pleaded elopement in the wife: the wife replied, that her husband had bargained and sold her to the adulterer; and held bad; and licence by husband to wife to lie with another man, cannot be pleaded in bar to an action of trespass by husband; nor that she was a notorious lewd woman; but these matters may be given in mitigation of damages.

Cafe 386.

Anonymous.

No *proferit* in a return to a *mandamus*.

IN THE ARGUMENT of a *mandamus* to a college at Oxford, Serjeant WRIGHT said, that upon a return to a *mandamus* they never make a *proferit in cur.*; because the party has never *oyer*, or any plea to make to it.

Master of college must be named in corporate acts.

SECONDLY, That it is a rule in corporations, *ubi major part ibi totum*; and that the master must be named in all corporate acts; because without him nothing can be done, but that his vote is included in that of the majority.

Lands given to a college in augmentation of the corporation.

THIRDLY, That if a man by will give lands to a college already founded, with charge to take in more into the corporation; that cannot be but by surrender of the former charter and taking a new one; for corporations cannot be at this day but by charter; before the statute of 13. *Eliz.* they might take a new charter, and that had been a surrender of their old one: but I am afraid they cannot do it without an act of parliament, because it is a kind of alienation; for it is giving a part of the right of the first members away.

Visitation belongs to the founder and his heirs.

HOLT, *Chief Justice*. The corporation is by name of "Master, Fellows, and Scholars;" and they are as it were the common-council of the college; and though the king made the corporation, yet the founder has power to dispose and order it as he thinks fit. And I take this to be altogether a lay corporation, and then the visitation belongs to the founder and his heirs; and if he die with-

a. Inst. 68.

Eq. Cases, 182.

Fitz. N. B. 42.

a. Roll. Abr. 230. Co. Lit. 96. 4. Mod. 124. 6. Com. Dig. "Visitor" (A. 3.).

out

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out heir, I take the visitation goes to the king; of which *vide* 5. *Edu.* 4. *Simon de Monford's Case*; and this is my private opinion; and whether the right of visitation should escheat, was a point which divided the Court in *Dr. Patrick's Case*: and there is a great diversity between abbot and convent, and master and fellows, and mayor and commonalty, &c. for in * case of abbot and convent, there must be the major part, and the abbot besides; and the reason is, because the abbot only acts *cum consensu* of the major part of the rest; but in case of master and fellows, &c. the master himself is but part of the acting part, and he is one of the grantors just as the rest. If it be a donative, and a private corporation, though it be spiritual, I am of opinion the visitation belongs to the founder, though he do not by express words reserve it to himself; for why should it of common right belong to the ordinary? And whether the king may grant the inheritance of a visitation, may be a question; for it may be said to be privy to his person; but without doubt he may grant to whom he pleases to be visitor for a time.

ANONYMOUS.

* [233]

Abbot and convent different from master and fellows.

Jacob *against* Dallow.

* Case 387.

SUIT was in the spiritual court concerning the right of a seat in a church; and suggested for a prohibition, that a right to a seat in a church was a temporal matter, determinable at common law.

In case, for disturbance of a seat in a church, it is sufficient to lay possession.

But *PER CURIAM*, If you would prescribe to a right against the ordinary, you must shew a usage to repair the seat; but in an action on the case for disturbance, you need only lay possession against any other disturber; and of common right the disposal of seats in a parochial church belongs to the ordinary. *May v. Gilbert (a)*, *Boothby v. Baily (b)* was held otherwise in this court, in *Buxton v. Baker (c)*, upon diversity between an action upon the case and a prohibition.

S. C. 2. Salk. 551.
S. C. 7. Mod. 8.
S. C. 6. Mod. 230.
S. C. 2. Ld. Ray. 755.
Ante. 228. *fmib.*
2. Mod. 283.

3. Lev. 74. *Vide* Ray. 52. 1. Lev. 71. 2. Jones, 4. 6. Mod. 436. 1. Burr. 314.

(a) 2. Keb. 150.

201. 1. Lev. 71. Ray. 52. 1. Keb.

(b) Hob. 69.

345. 370. 386. 420. 433. 457.

(c) *Buxton v. Bateman*, 1. Sid. 88.

Spack *against* Spicer.

Case 388.

TRESPASS against ten, two of them make default, and the rest were acquitted by a verdict, which was certified to be against evidence, and a writ of enquiry of damages against the two was executed; and a new trial moved for,

New trial refused, where writ of enquiry had been executed against some.

And denied *PER CURIAM*; because the plaintiff had damages and costs against two.

HOLT, Chief Justice, said, the jury ought not to be allowed to sever the damages; and that in an action against twelve, if two of them

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Spencer
against
Spencer.

* [234]

them make default, and the rest are acquitted against evidence; yet there ought to be no new trial, because there were costs once recovered. In trespass brought against two, if one of them make default, and the other is found guilty, and damages be against him; and then the * other comes in, and a declaration is against him, with a *simul cum*, and damages against him too, being found guilty, and the two *posseas* are returned, here the plaintiff may chuse *de meliorib. damnis*; but here he should have entered a *non prof.* against these two; though even so, I durst not warrant him a new trial.

Case 389.

Anonymous.

Nuisance.

Ante, 232, 232.

AN INDICTMENT for common nuisance is never quashed upon motion.

Case 390.

Anonymous.

Pleading.

IF DECLARATION be delivered before the morrow of *All Souls*, the plea must be put in before effoin-day of next Term.

Case 391.

Anonymous.

Sessions.

PETIT SESSIONS, not sessions for making an order concerning the poor.

Case 392.

The King against Camberwell.

The word *declared* shall not operate retrospectively.

BEFORE the statute 4. & 5. *Will. & Mary*, forty days service made a settlement, and then an act comes and says, "be it declared, that no service less than a year shall make a settlement;" that word "declared" shall not make a retrospect to avoid a prior judgment upon the former statute.

Case 393.

— against Palmer.

If an award be made by Rule of Court, that money should be paid on one side, and nothing awarded on the other, the Court will not grant attachment till a release be tendered.

A SUBMISSION TO AWARD was of all matters in controversy by Rule of Court; and an award was made, that so much money should be paid of one side, and nothing was awarded of the other side; and it was moved to set it aside, as being an award only *ex parte*.

HOLT, Chief Justice. The common exceptions against an award will not hold here, it being an award, upon submission by Rule of Court; for though there be no release awarded of one side, yet the submission was "of all matters in controversy;" and the Court will not grant an attachment before they tender a release; for if one come to have aid of the Court, he shall do that which is fair and equitable before he has it.

Pratt

* Anonymous.

Case 394.

PRATT moved to quash an indictment taken before justices of peace; for that it was only *justitiar. ad pacem*, without *conservand. assignat.* Indictment quashed.
Yld: taken
1. Saund. 263.

But it was refused; for THE COURT said, though it were an old exception, yet they did not like it.

Anonymous.

Case 395.

HOLT, *Chief Justice*. If a writ be returnable this Term, and do not come in until the next, it ought to be filed of the Term whereof it is returnable. When a writ must be filed.

NOTE, The same thing was ruled by him in *Michaelmas Term*, in the fourth year of *Queen Anne*.

Clerk against Butler.

Case 396.

THE DEFENDANT "*venit et defendit vim et injuriam quando*," "*&c.*" and then would plead *a misnomer*: Misnomer not to be pleaded after defence made.

And IT WAS SAID, that he could not plead that, or to the jurisdiction of the Court, after pleading *defendit vim et injuriam*; for that he had admitted himself by that name. *Brownl. 203, 204. Co. Ent. 122. Rast. 107. 146.*

Curia advisare vult.

Jennison against Ellis.

Case 397.

UPON A WRIT OF ERROR, the want of original was assigned, and one was certified varying from the declaration. Original variant.
S. C. post. 320.

HOLT, *Chief Justice*, said; Let the variance be ever so great, yet since it is so certified, it shall be taken for the original in this action.

The King against Moor.

Case 398.

MOOR was indicted for suffering bone-lace-makers to set up their goods upon stalls within his yard, and taking so much a-piece from them for it. On submitting to a fine, the recognizance entered into for trial to be discharged.

It was said to be a setting up of a market, and that a *quo warranto* would lie; and by consequence an indictment for the user.

And here he pleaded guilty, and submitted to a fine; and hereupon, though he had entered into a recognizance to try it, his recognizance was discharged.

*See Rex v. Pat-
tison, post. 317.*

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Cafe 399.

Anonymous.

Tithe of rakings
of corn.

HOLT, Chief Justice. One may libel in the spiritual court for tithe of rakings of corn, if it never was gathered into sheaves; but *secus* after the corn has been gathered into sheaves, and there was no fraud in the gathering; and a prohibition would lie.

2. Leon. 28.

1. Roll. Rep.

379. 1. Roll.

"Difines" (H. 1.).

Abr. 645. Moer, 278. 910. Cro. Eliz. 475. 660. 702. 3. Com. Dig.

Cafe 400.

Anonymous.

Principal may
be surrendered
without notice,
before recogni-
zance forfeited.

HOLT, Chief Justice. If one surrender in discharge of bail, before recognizance forfeited, he need not give notice to the plaintiff, but it may be pleaded to the *scire facias* against the bail; but where a *capias* is gone, and a *non est inventus* returned, whereby he forfeits his recognizance, if he would ask a favour of the Court, he ought to give notice (a).

1. Jones, 189.

Barnes, 88.

1. Strange, 198.

Rep. 401.

2. Strange, 915. Kelly v. Medley, Tidd's Pract. 147. Edwin v. Allen, 5. Term

(a) See Anonymous, post. 601.

Cafe 401.

Anonymous.

Demise of liv-
ing.

HOLT, Chief Justice. It is a *quare* whether a parson may demise all his living; because it may amount to non-residence.

Cafe 402.

Anonymous.

Original.

HOLT, Chief Justice. The *custos brevium*, upon a *certiorari* directed, &c. has no power to certify any original, but such as are of that Term of which the *placita* are.

Cafe 403.

Anonymous.

If a person be
libelled in the
spiritual court
for two causes,
one within the
other without its
jurisdiction, a
prohibition shall
not go after sen-
tence.

LIBEL was in the spiritual court for calling a woman "whore," and saying that "she kept a bawdy-house;" and after sentence a prohibition was moved for;

And urged *contra*, that they should have alledged below, that the words were spoken at one and the same time, and then they might be prohibited.

But now as they have jurisdiction below for calling a woman "whore," and that was all they gave sentence for, they would not grant a prohibition (a).

(a) See the case of Grimes v. Lovel, post. 242. Whitfield v. Powel, post. 248. See also 2. Burr. 813. Cowp. 424.

1. Term Rep. 3. 552. 6. Com. Dig. "Prohibition" (D.).

Lug

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Lug *against* Lug.

Case 404.

IT WAS DECREED by the Delegates, of which TREBY, *Chief Justice* of the common pleas, was one, that where *A.* had made a will, and by it devised all his personal estate to *B.* and *C.* and afterwards *A.* married *D.* by whom he had several children, and died without taking any notice of this will; that this marriage of *A.* with *D.* amounted to a revocation of this will, but that it is only a presumptive revocation; and therefore if by any expression or other means, it had appeared that the intent of it was, that it should continue in force, the marriage had not been a revocation: and the sentence given in the spiritual court was affirmed (*a*).

Marriage, and the birth of a child, is a presumptive revocation of a will of personal effects.

S. C. 2. Salk. 572.
S. C. 1. Ld. Ray. 441.
2. Vern. 104.
148.
2. Show. 242.

(*a*) See *Eyre v. Eyre*, 1. Peer. Wms. 304.
Overbury v. Overbury, 2. Show. 242.
Wellington v. Wellington, 4. Burr. 2165.
1. Bl. Rep. 645. *Brady v. Cubit*, Dougl.
30. *Brudnell v. Broughton*, 2. Atk. 268.
Brown v. Thompson, Cases in Eq. 413.
Doe, on the Demise of Lancashire, v. Lancashire, 5. Term Rep. 49 to 64.

Hodgeson v. Lloyd, 2. Brown. C. C. 534.
See also *Ewebank v. Hattenwell*,
2. Brown. C. C. 220. 514. *Lawrance v. Wallis*, 2. Brown. C. C. 319. *Driver v. Starding*, 2. Will. 88. *Christopher v. Christopher*, 4. Burr. 2171. *notis.*
and *Wright v. Netherwood*, 2. Salk. 6. edit. 593. *notis.*

* [237]

* The Bishop of St. David's *against* Lucy:

Case 405.

LUCY promoted a suit *ex officio* before the archbishop of *Canterbury*, against the bishop of *St. David's*, upon several articles for simony, and other offences. The bishop put in his answer. Proofs being made for the promoter, the bishop appealed, upon a *gravamen*, to the Delegates; and, pending the appeal, moved for a prohibition; on suggestion that the matters contained in the articles were of temporal consequence.

An archbishop may exercise the jurisdiction he possesses over his bishops in what part of the diocese he pleases; and therefore a citation to appear before himself or his vicar general, "at his Hall at Lambeth House," &c. is good, although it is not regularly an ecclesiastical court.

IT WAS URGED for a prohibition,

FIRST, That it did not appear that the bishop of *St. David's* was cited to appear in any court of which the law took notice, for the citation is to "appear before the archbishop of *Canterbury*, or his vicar-general, in his hall at *Lambeth House*, to answer, &c." which is not a court of which the law takes notice; for the archbishop having the same power over his suffragans that every bishop has over the clergy of his diocese, and no bishop can cite any of his clergy before him but in his court; therefore the citation here ought to have been to appear in the arches, or some other court of the archbishop.

S. C. 1. Salk. 134.
S. C. 3. Salk. 90.
S. C. Carth. 484.

But it was answered, that doubtless the archbishop had jurisdiction over all the clergy within his province; and cited the case of *Dr. Wood*, bishop of *Litchfield* and *Coventry*, 1687, who was suspended by archbishop *Sancroft* for dilapidations, and the profits of his bishoprick were sequestered, and the episcopal palace built out of them.

S. C. 1. Ld. Ray. 447. 539.
S. C. Holt, 651.
1. Bl. Com. 38a.

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THE BISHOP
OF ST. DAVID'S
against
LUCY.

HOLT, *Chief Justice*, said, that to admit this point of jurisdiction to be disputed, was to dispute fundamentals; for the archbishop had, without doubt, provincial jurisdiction over his suffragan bishops, which he may exercise in what place of his province he pleases, for it is not material to be in the arches any more than in any other place; for the arches is only a peculiar consisting of twelve parishes within *London*, exempt from the bishop of *London*, and that is properly the arches; and though the provincial and metropolitan jurisdiction be exercised there also, yet it may be exercised elsewhere; for the citation is to appear before the archbishop, or his vicar general, who is an officer the law takes notice of; for the vicar general in the province is the same as the chancellor in a particular diocese; and the dean of the arches is also a vicar general of the archbishop over all his province, and acts in the arches sometimes as vicar general, and sometimes as * dean of the arches.

* [238]

An archbishop cannot deprive a suffragan of a benefice, which lies within the diocese of another suffragan, for simony with respect to that benefice.

THEN IT WAS OBJECTED, that the matters contained in the articles were of temporal consufance.

THE FIRST whereof was, that the bishop, being incumbent of the rectory of *Burrough Green* in *Cambridgeshire*, in the diocese of *Ely*, covenanted with *William Brooks* for two hundred pounds to make him his curate, and to resign the rectory to him on request.

And it was argued, that this contract was made as incumbent of *Burrough Green*, and not as bishop of *St. David's*; and therefore ought to be sued for in the consistory court of *Ely*, and not *per saltum* before the archbishop, in case this were admitted to be simony.

To which it was answered, that if the bishop make a simoniacal contract, it is a personal offence in him, and against the duty of a bishop, and punishable by the metropolitan and ecclesiastical censures; but if the archbishop proceeded against the bishop to deprive him of his benefice of *Burrough Green*, the objection might have held.

And of that opinion was THE WHOLE COURT.

The archbishop may punish a suffragan for simony, although it is not simony within the statute 31. *Eliz* c. 6.

THE SECOND was, That there is no matter alledged in this article that amounts to *simony*; for the bond to resign was never executed, and therefore it is not within the statute 31. *Eliz* c. 6.

And as to THE SECOND OBJECTION it was answered, that this is a simoniacal contract, and punishable by ecclesiastical censures, and properly so before the statute of 31. *Eliz* c. 6. by spiritual law; then if the fact be simony, it is consufable in the spiritual court, as it was before the statute; the buying of crifme, or anything *quod ad spiritualia pertinet*, is simony. But the common law takes no notice of any simony but what the statute mentions, which has not defined simony in fuch a manner as to fay what fhall be simony, and what not, by the spiritual law. And if the arch-

1. *Ld. Ray* 544.
2. *Term Rep.* 556.
3. *Term Rep.* 5

bishop

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bishop, &c. shall adjudge that to be simony which is not so, it is THE BISHOP
OF ST. DAVID'S
against
LUCY. good cause of an appeal, but not of a prohibition;

Quod fuit similiter concess. PER CURIAM.

And HOLT, Chief Justice, said, that simony is such an offence by the canon law, as incurs deprivation, and the common law does not take notice of it to punish it: there is not the word "simony" in the statute of 31. Eliz. c.6. but only "buying and selling;" and it would be very unjust, if ecclesiastical persons offend against their ecclesiastical duty, in such instances as the king's bench cannot take notice of, that it should prohibit them to punish them according to their law. The clergy are obliged to obey laws which laymen are not; for a convocation, with consent of the king, may make canons to bind the clergy, and the disobeying them is cause of deprivation; and so were the canons of 1603, and simony was * [239] defined to be (a) "*studiosa voluntas emendi aut vendendi spiritualia aut spiritualibus annexa*;" and a contract might be good at common law, and yet be simony.

Then THE BISHOP'S COUNSEL urged against the article for A parson is not taking *excessive fees* for institution, conferring of orders and procurations, that these were extortions punishable by indictment. intituled to any
see for christenings, burials, &c,
except by custom.

But PER CURIAM it was said, that of common right, and by canon law, no parson could take anything for christenings, burials, visiting the sick, &c. (b); but by custom they have been allowed Lindw. 278. to take something; and procurations are only suable in the spiritual court, and a mere spiritual duty. For these things parsons were obliged to do *ex officio gratis*, and taking money for them was simony, and now taking more than usage allows will be so still (c).

THEN IT WAS URGED by Counsel against another article, *viz.* Where a statute that he ordained one without administering the oaths to him; and yet makes a thing a certified under his episcopal seal that he had taken the oath, which temporal offence, which is is punishable at common law, by the statute of 1. Will. & Mary, punishable by the canon law, the it being a breach of that statute. spiritual court
may proceed to
deprivation, but
cannot punish it
as a temporal offence.

But it was answered BY THE COURT, that this statute had made it part of the office of a bishop to tender the oaths upon ordination; and then the metropolitan may proceed against him for doing contrary to the duty of his office, but not punish him as for a temporal offence. So is *Caudrey's Case* (d), where by special verdict it was found, that *Caudrey* was deprived by the high commissioners for preaching against the common prayer; and though there was another punishment appointed by the statute, and not deprivation until the second offence, yet it was adjudged they might proceed by their proper law and deprive him, it being against his duty as a minister so to preach. If a clergyman be perjured, &c. after conviction here, he may be proceeded against below in order to deprivation.

(a) 3. Cro. 789. Moor, 779. 332. Topfal v. Ferrers, Hob. 175.
(b) 12. Mod. 239. Salk. 332. Andrews v. Simpson, 1. Burn. E. L. 249.
1. Ld. Ray. 1588. 3. Bl. Com. 90. (d) 5. Co. 1. S. C. Ander. 122.
(c) Burdeaux v. Lancaster, 1. Salk. S. C. Poph. 59.

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THE BISHOP In *Sir John Savage's Case* (a) if the keeper of a gaol suffer an escape, the king may seize upon his office immediately, and it may be felony besides; but the seizure of the office shall not be for the felony, but for the neglect.

of St. David's
against
Lucy.

Other articles were for misemploying the revenues appropriated to the finding a school-master and an usher, and putting in women in their stead.

And for detaining of exemplifications of letters patent, &c. a prohibition was granted; and the rule discharged as to all the rest.

Afterwards the bishop was deprived, and the sentence, on appeal, confirmed by the Delegates.

* [240]

* NOTE, Here it was held, that by the *Council of Chalcedon* received in *England*, *Can. 2.* and *Council of London*, 810. it is simony to take money *pro institutione* or *ordinatione*; and that forging of orders was originally of spiritual consueance, and not by the act of 31. *Eliz. c. 6*: That misapplying revenue is cause of deprivation: That when the act commanded him to tender oaths, and he disobey, it is good cause of deprivation; as if an act of parliament should desire the Judges to do something, and they should not obey, it is a forfeiture of their office: And lastly, that by canon law received in *England*, such as put episcopal seal to a falsity, or use such impression knowingly, *incurrunt pœnam falsarii. Card. Otbo. Const. f. 65. Linwood Prev.*

(a) Keilw. 192. p. 3. S. C. Dyer, 151. p. 4.

Case 406.

Wicket and Foot against Creamer.

Death of one plaintiff in error is no abatement of the writ.

S. C. Salk. 264.
S. C. 1. Ld.
Ray. 439.
S. C. Holt, 274.

Ante, 231.
Cro. Jac. 256.
Salk. 93.
Sua. 1095.

DEBT ON A BOND for performance of covenants against the defendant, and judgment for the plaintiffs; whereupon the defendant brought error, but put in no bail. *Wicket* died; the survivor sued out two *scire facias quare executio non* of the judgment; and on two *nihil* returned, he had an award of execution, and a *cepias ad satisfaciendum* issued; whereupon the plaintiff was taken in execution.

ROBERT EYRE moved to discharge him, because the writ of error was a *superseas* to the execution, without any bail; it being a bond for performance of covenants, and not for payment of any money; and the death of one plaintiff in error is no abatement of the writ; *quod Curia concessit*.

BUT IT WAS URGED on the other side, that the execution was good; because the defendant had an opportunity of pleading the writ of error pending, which he not doing could not take advantage of it now.

But

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But CURIA *contra*; for, two *nibils* being returned, he had no day to plead it, but if a *scire feci* had been returned it had been otherwise; and on that difference an *audita querela* has been often allowed and disallowed: and in many cases, where the defendant may have an *audita querela*, the Court will relieve on motion; but if the ground of the *audita querela* be a release, or other discharge, it may be reasonable to put the defendant to his *audita querela*, that the plaintiff may deny it, if he think fit. And a *superfedeas* was in this case awarded, *quia erroneè emanavit*: and in this case the survivor had no occasion for a *scire facias* to revive the judgment, for it survived to him.

WICKET' AND
FOOT
against
CARPENTER.

* [241]

* Robertson *against* Moor.

Case 407.

IN EJECTMENT; between the first day of the assizes and the verdict the defendant died.

Judgment in ejectment, the defendant died between the first day of the assizes and the verdict.

Upon affidavit of this fact, the defendant's Counsel moved to stay execution, and said this was not helped by 17. Car. 2. and quoted 1. Sid. 131. Hard. 51. where the like motion had been granted.

And GOULD, *Justice*, said, that he had known it granted, and as often denied.

S. C. Salk. 8.
Moor, 469.
1. Burr. 363.
Cro. Car. 314.
Run Eject. 411.
413.
1. Will. 302.

But PER CURIAM, Let things stay till notice of motion to the plaintiff.

But afterwards THE COURT held the judgment well entered.

The Governor and Company of the Bank of England *against* Newman. Case 408.

BELLAMY gave a bill of exchange payable to Newman or bearer; Newman went and negotiated it with THE BANK, at the usual rate of interest; after this the Bank received one thousand pounds of Bellamy, and after that demanded the money due on the bill of a servant of Bellamy, who did not pay it. Afterwards Bellamy failed, and the Bank brought an *assumpsit* against Newman for the money; and on general issue a verdict for the plaintiff.

If a person give cash for a note or bill payable to bearer, without its being indorsed, it is a purchase of such note or bill, and he must sustain the loss if not paid.

And a new trial was granted, the verdict being against law; for whatsoever may be the practice among the bankers, the law is, that if a bill or a note be payable to one "or bearer," and he negotiate the bill, and deliver it for ready money paid to him, without any indorsement on the bill, this is a plain buying of the bill; as of tallies, bank-bills, &c.; but if it be indorsed, there is a remedy against the indorser.

S. C. Comy. 57.
S. C. 1. Ld.
Ray. 442.
Ante, 203.
Postea, 204.
Barclay on Bills,
12. 17. 48.
Bull N. P. 277.

But HOLT, *Chief Justice*, laid the rule thus: If a man give such a bill for money not due before, without indorsement, it is a

2. Sura. 1175.

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THE sale of the bill.—And he held, that a demand of a servant of
GOVERNOR OF the drawer, who used to pay money for him, was a good de-
THE BANK OF mand (a).
ENGLAND

against (a) See Hill v. Lewis, Skin. 411. v. Sedgwick, 1. Ld. Ray. 180. and the
NEWMAN. Hob. 117. and The Bank of England v. statute 3. & 4. Ann. c. 9. l. 7.
Newman, 1. Ld. Ray. 442. Nicholson

Case 409.

Lawly against Dibble.

Money brought NORTHLEY moved to bring money into court upon a cove-
into court. nant, and was refused (a).
Ante, 90. 95.
287, 188. Postea, Pasch. 12. Will. 3. Farrell's Case.

(a) But see 2. Salk. 596. 1. Will. 75. Houghton, Barnes, 284. Fulwell v.
2. Burr. 1120. and 8. Mod. 305. Hall, 2. Black. Rep. 837. and Scllon's
1. Tidd's Practice, 409. Walmouth v. Practice, 309.

* [242]

Case 410.

* The King against Flint.

Indictment un- INDICTMENT against a baker *quod sex collyras, ANGLICE*
certain. loaves, *panis triticeus debitum pond. minime contin. et sex collyras*
S. C. 2. Salk. *panis domastici debitum pondus minime continen. venditioni expuguit.*
687. Upon demurrer;

S. C. 1. Ld.
Ray. 442.

THE FIRST EXCEPTION was, That it did not appear but both
the six loaves were the same, and so the defendant would be pu-
nished twice for the same offence.

An indictment
for making bread
short weight
must state the
affize.

THE SECOND, It does not appear what the *debitum pondus* or
affize of bread was, or how much these loaves fell short of it, and
so too uncertain; for the offence ought to be so certain that the de-
fendant might plead it to another indictment, and the Court
might measure their fine by the nature of the offence.

3. Burr. 1697.

And judgment for the defendant. *Vide 5. Co. 121.*

Ante, 231.

And NOTE, the Court would not quash this indictment on mo-
tion, because oppressive of the poor.

Case 411.

Grimes against Loyel.

Calling a woman LIBEL IN THE SPIRITUAL COURT for these words, "You
"whore and
"pockywhore,"
not feasible in the
spiritual court.
"are a damned bitch, whore, and a pocky whore, and if you
"have not the itch, you have the pox."

S. C. Holt, 593.
S. C. 1. Ld.
Ray 446.
Cro. Car. 110.
1. Sid. 404. 1.
2 Term Rep. 473.

And moved for a prohibition, because an action lies at com-
mon law. And a difference was taken, where the word "pox"
could not be intended but of the "*French pox*," by the words
that were joined with it; there an action lies.

2. Mod. 21. 2. Lev. 63. Stra 823. Bunb. 312. Salk. 692. 3. Lev. 319.
2 Term Rep. 473.

And

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And HOLT, *Chief Justice*, said, that where the word "pox" was joined with the word "whore," it should be intended of the "French pox."

Casus
against
Lovel.

And a prohibition was granted (a).

(a) See Anonymous, ante, 236. and 1. Com. Dig. "Action for Defamation?"
Whitfield v. Powel, post. 248. and (F. 19.).

Gilbert *against* The Inhabitants of Puddlesgate.

Cafe 412.

ACTION upon the statutes of Hue and Cry (a); *not guilty* was pleaded; and a verdict for the plaintiff.

In an action on the statutes of HUE AND CRY it is not necessary to lay a *venue* where the examination was taken.

IT WAS MOVED *in arrest of judgment*, that no *venue* was laid, where the examination before the justice of peace was within twenty days, which was traversable, and not aided by the verdict, it being a penal law.

BUT PER CURIAM, This is a remedial and not a penal law; and if penal, yet this is well enough; because it is not that which intitles party to the action, but only the *causa sine qua non*; but perhaps it might be fatal on a demurrer.

Bunb. 261.
Andr. 25.
1. Com. Dig. "Action" (N. 12.).

(a) See the statute of Winchester, 3. Hawk. P. C. 7th edit. page 157 19
13. Edw. 1. c. 4. 28. Edw. 3. c. 11. 160.
27. Elm. c. 18. and 8. Geo. 2. c. 16.

* [243]

* Hilton *against* Byron.

Cafe 413.

HILTON, a quaker, prayed security of the peace against Byron, and offered to make his *declaration* according to the late act of parliament (a), that he was afraid of his life, &c.

Oath required from a quaker on his demanding surety of the peace.

But this being a criminal matter, THE COURT held it to be out of the act; and would not grant it, except he would take the usual oath.

S. C. 3. Salk. 133. 248.

(a) The 7. & 8. Will. 3. c. 34. But see now 8. Geo. 1. c. 6.; and 5. Mod. 403. Stra. 441. 527. 856.

Hart *against* Hall.

Cafe 414.

MOTION for a prohibition to stay a suit for tithes of an old mill, viz. every tenth toll-dish (a), on suggestion that it was an old mill.

Tithes of a mill. S. C. Holt, 673. 2. Inst. 621.

But by HOLT, *Chief Justice*, The plaintiff ought in his suggestion to prescribe *in non decimando*, and also to bring an affidavit of the truth of the fact; and so it was adjudged in Lord Chief Justice HALE's time, in the like case; for he said, that of common right tithes were not due out of a mill; yet before the statute of

3. Com. Dig. "Dimes" (H. 12.).

(a) See 1. Roll. Abr. 656. 2. Roll. Rep. 84. Dodson v. Olivers, Bunb. 673. 9. Vin. Abr. 40. 1. Brown. P. C. 157. Donak v. Lowther, 2. B. & K. B. 336. Chamberlain and Plympton v. Newte,

Articuli

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HART
against
MILL.

Articuli Cleri (a) some mills did pay, and some did not, and upon that it was enacted, "that *de molendino de novo erect. non jacet prohibitio*;" and for such as paid before that statute, they shall still pay. And he said, tithes were either predial or personal, for the corn paid tithe before; and it is necessary to prescribe in a *non decimando* in an old mill; and he quoted the case of *Hughes v. Hertford* (b).

(a) 9. *Edw. 2. c. 5.*

(b)

Case 415.

Anonymous.

No prohibition
to the admiralty
for refusing copy
of a libel.

HOLT, *Chief Justice*, refused to grant a prohibition to the admiralty for refusing to give a copy of the libel; because the statute 2. *Hen. 5. c. 3.* extends only to the ecclesiastical court, and not to the court of admiralty (a).

(a) See also 2. & 3. *Edw. 6. c. 33.* and 1. *Com. Dig.* "Prohibition" (F. 15.).

MICHAELMAS

MICHAELMAS TERM,

The Tenth of William the Third,

A T

The Guildhall,

BEFORE

Sir John Holt, Knt. Chief Justice.

The King against Cole.

Cafe 416.

THE DEFENDANT was indicted, for that he, being a bankrupt, and brought before the commissioners, refused to give them an account of his effects. And his defence at the trial, upon not guilty pleaded, was, that he was an infant at the time of the debts contracted, and therefore could not be a bankrupt.

Infant cannot be a bankrupt. S. C. Holt, 360. S. C. 1. Ld. Ray. 443. 1. Atk. 146. Rep. Temp. King, 46. Bull. N. P. 38.

And of that opinion was HOLT, Chief Justice; for though the debts of an infant are only voidable at his election, yet no one can be a bankrupt for debts he is not obliged to pay.

Wherefore the defendant was acquitted (a).

(a) See Ex parte Meyot, Bull. N. P. 38. Ex parte Sidebottom, 1. Atk. 46. *acced.*

* Lambert against Oakes.

* [244]

Cafe 417.

R. DREW a bill (a) payable to Oakes or order: Oakes indorses it to Lambert; and Lambert brings an action for the money against Oakes.

Note of hand to be demanded of the drawer before the indorsee liable. S. C. Holt, 118. S. C. 1. Ld. Ray. 443.

And by HOLT, Chief Justice, it was said, that he ought to prove that he had demanded or endeavoured to demand his money of R. before he could sue Oakes on the indorsement (b): so if the bill

(a) It was a note of hand. See Kyd on Bills, 169, 170.

(b) It is now very fully settled, that in an action against the indorser of a bill it is not necessary to prove an application to the drawer for payment, Bromley v.

Frazier, Stra. 441. Lawrance v. Jacob, Stra. 515. Lake v. Hayes, 1. Atk. 282. Heylin v. Adamson, 2. Burr. 669. But on a note such a demand must be made. See Kyd on Bills, 169.

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LAMBERT was drawn on any other person, payable to *Oakes* or order, the demand, to intitle *Lambert* to his action, ought to be after the indorsement.

An indorsee may bring an action on a blank indorsement. **SECONDLY**, *Oakes* indorsed this bill blank to *Lambert* by writing his name only; and therefore it was urged, that this was a sale of the bill, and the indorsement could not subject the indorser to an action.

Ante, 241. Dougl. 611.617. Kyd on Bills, 89. 2. Burr. 1222. Bailey on Bills, 13.

But by **HOLT**, *Chief Justice*, The indorsement, though upon discount, will subject the indorser to an action; because it is a conditional warranty of the bill, and makes a new contract, in case the person on whom it was drawn do not pay (*a*).

A blank indorsement subjects the party to whatever may be supercribed. **THIRDLY**, by **HOLT**, *Chief Justice*, If a man indorse a bill blank to *B*, he puts it in the power of *B*. to superscribe what *B*. pleases (*b*).

Ante, 193. Bailey, 28.

Indorsee not liable unless the money is demanded in time. **FOURTHLY**, If the indorsee do not demand the money payable by the bill, on the person on whom it is drawn, in a convenient time, and afterwards he fails, the indorser is not liable (*c*).

An indorser liable though the note is forged. **FIFTHLY**, If the action be brought against the indorser, it is not necessary to prove the hand of the drawer; for though it be forged, the indorser is liable (*d*).

(a) See Bailey on Bills, 19.

(b) See *Ruffell v. Langstaffe*, Dougl. 514. in point.

(c) See *Danack v. Savage*, 1. Show. 355. *Manwaring v. Harrison*, 1. Stra. 308. *East India Company v. Chitty*, 2. Stra. 1175. *Hankey v. Trotman*, Black. Rep. 1. *Chamberlain v. De la*

Live, 2. Will. 353. *Appleton v. Swetapple*, Bailey, App. No. 6. *Tindal v. Brown*, 1. Term Rep. 167.

(d) See *Anonymous*, post. 345. *Jennys v. Fowler*, Stra. 946. *Price v. Meale*, 3. Burr. 1354. *Collins v. Emmet*, 2. H. Bl. Rep. 313. See also *Kyd on Bills*, 203. &c.

Case 418.

Tod against Stokes.

Husband is not liable to debts contracted by his wife after notorious separation, and maintenance allowed her. **THE PLAINTIFF**, an apothecary, sued the defendant, a parson living in *Chichester*, for physic administered to his wife in *London*.

On *non assumpsit* pleaded, it appeared, on evidence, that the defendant and his wife had been parted by consent for five years last past, and that on separation, by articles to trustees of the wife's naming, the defendant had obliged himself to allow the wife twenty pounds a-year; which he did accordingly, and had a covenant from the trustees to exonerate him of all the charges of the wife; and that the plaintiff did not know the wife to be a *feme covert* at the time of the medicines given.

• [245] • And by **HOLT**, *Chief Justice*, these points were held:

FIRST, That the reason why the husband shall pay debts contracted by the wife is upon the credit the law gives her by implication,

S. C. Salk. 116.

S. C. Holt, 100.

S. C. 1. Ld.

Ray. 444.

• [245]

6. Mod. 147.

Stra. 875. 1214.

1. Bac. Abr. 295.

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cation, in respect of cohabitation; and is like credit given to a servant (a).

Too
against
Stout.

SECONDLY, That if husband and wife part by consent, and the husband secure her an allowance, it is in consideration that he should not be charged any more by her; and it is unreasonable he should be charged for victuals, or physic, or other necessaries after (b).

THIRDLY, That a personal knowledge of such agreement is not necessary, so it be publicly and notoriously known (c).

FOURTHLY, That such public knowledge of the agreement need not be at *London*, where the debt is contracted, but is sufficient if it be where the parties lived, viz. in this case at *Chichester* (d).

FIFTHLY, That if the debt were contracted by the wife in so short a time after the agreement, as it could not be known at *Chichester*, in that case the husband would be liable (e).

SIXTHLY, If a husband turn away his wife, he must send credit with her for reasonable expenses (f).

SEVENTHLY, If a wife go away without consent of her husband, she shall find credit where she goes, without any charge to her husband, or his giving any personal notice of leaving him. And he said the case of *Scot v. Manby* (g) had been carried too far in this; and he remembered a case before him at *Exeter* assizes, *Lungworthy v. Huckmore* (h), where he held, that if a wife elope from her husband, and take up necessaries from a tradesman, who has no notice of the elopement, the husband should not be liable; and it is sufficient for the husband to give general notice that tradesmen, &c. should not trust his wife.

BUT SERJEANT WRIGHT, now lord keeper, at the same time acquainted his lordship, that TREBY, *Chief Justice* of the common pleas, had ruled that point otherwise in an action between the same parties (i).

To which HOLT, *Chief Justice*, said, that notwithstanding he would adhere to his opinion in all the points aforesaid.

And the plaintiff was nonsuited (k).

(a) See 2. Lev. 16.

(b) *Ferrers v. Ferrers*, 1 Vern. 71.
Angies v. Angies, Prec. in Chan. 499.
Dent v. Scott, Allen, 61. *Craig v. Bowman*, 6. Mod. 147. *Corbet v. Polenitz*, 1. Term Rep. 9. *Compton v. Collinson*, 1. H. Bl. Rep. 364.
2. Bro. C. C. 377. *Ellah v. Leigh*, 5. Term Rep. 682.

(c) See *Craig v. Bowman*, 6. Mod. 147.

(d) *Angies v. Angies*, Gilb. E. R. 153.
(e)

(f) *Etherington v. Parrott*, 1. Salk. 118. *Thompson v. Harvey*, 4. Burr. 2177.

(g) Sid. 109. 2. Lev. 4.

(h) 10. Will. 3.

(i) See *Car v. King*, post. 372.

(k) See upon the subject of a husband's liability to pay debts contracted by his wife, Mr. Evans's note to *Etherington v. Parrott*, 1. Salk. 6th edit. 118. Mr. Nolan's note to the case of *Bolton v. Prentice*, 2. Strange, 3d edit. 1214. and the notes to the case of *Manby v. Scott*, 1. Mod. 184.

Turner

Michaelmas Term, 10. Will. 3. At Guildhall.

Case 419.

Turner *against* Brent.

An action lies against a person for knowingly selling goods to which he has no title. — Cro. Jac. 4. 471. 1. Salk. 282. Moor, 126. Allen, 91.

A. SELLS GOODS TO *B.* to which he has no title ; if *A.* know that he has no good title to them, an action lies against him for the deceit, if the owner recover them against *B.* but *secus* if *A.* do not know but his title to them is good.

MICHAELMAS

MICHAELMAS TERM,

The Tenth of William the Third,

I N

The King's Bench.

Sir John Holt, *Knt. Chief Justice.*

Sir Thomas Rokeby, *Knt.*

Sir John Turton, *Knt.*

* * * * *

} *Justices.*

Sir Thomas Trevor, *Knt. Attorney General.*

John Hawles, *Esq. Solicitor General.*

* [246]

* Rigdon *against* Hedges, Judge of the Admiralty. Case 420.

GOODS were arrested in the river *Thames* by process of the COURT OF ADMIRALTY, and a rescue made, and a warrant against *Rigdon* for a contempt of their process.

And in a motion for a prohibition it was suggested, that the original process was of a thing out of their jurisdiction, and therefore there could be no contempt.

E contra, it was urged that this suggestion came too soon, because it cannot be known whether they have jurisdiction or not, until bail be put in to the action; and so in the ecclesiastical or inferior courts, if a prohibition be sued on a suggestion, that the cause of action is out of their jurisdiction (*a*). So in the case of a *modus* for tithes, you must suggest that you pleaded it below: and so on proceeding below for words: and without doubt they might have a jurisdiction: and their way had been to move for a prohibition immediately, or to put in bail, and then to move upon the libel: and every court that has a jurisdiction may punish for contempt of their process; and here the Court will give them the credit that they do right, until the contrary appears.

If goods be arrested in the river *Thames* by process from the admiralty, and rescued, the court of admiralty may grant a warrant against the rescuer for a contempt of the process; but it should appear by the process that they had jurisdiction, and therefore if it only say "*in causâ mariti- mæ*," the party may plead it below, and if the plea be refused a prohibition lies.

(*a*) 1. Vent. 180. 1. Mod. 81.

HOLT,

Michaelmas Term, 10. Will. 3. In B. R.

RIGDON
against
HEDGES,
JUDGE OF THE
ADMIRALTY.

HOLT, *Chief Justice*. Surely the cause that brings it within their jurisdiction ought to be set forth in their process; and it is too general to say "*in causâ maritimâ*." If goods be taken at sea by pirates, and sold by them at sea, and brought to shore, *prize or not prize*, shall be tried in the court of admiralty. 2. *Saund.* 260. *Ray.* 189. 2. *Mod.* 237.

They would not grant a prohibition without affidavit that they had pleaded the matter below.

And it was said, that the usage is by warrant to seize the goods, which, upon bail, are delivered back, and then a libel is given.

But CURIA, Let a prohibition go, and declare *insanter*, and we will hear Civilians next Term.

A ship arrested within the jurisdiction of the admiralty and rescued, may be seized any-where.

And here PER CURIAM, If a ship be arrested by warrant of THE COURT OF ADMIRALTY within their jurisdiction, and afterwards is rescued, they may re-seize her out of their jurisdiction, and no prohibition lies.

Case 421:

Hyde against S——.

The death of the husband in trespass against husband and wife.

TRESPASS against husband and wife; the husband died.

S. C. Holt, 101. Kely. 31. *contra*.

SIR FRANCIS WINNINGTON moved it in arrest of judgment.

* [247]

Sed non allocatur; for a wife may commit trespass along with her husband, and also felony, if it be not by coercion* of her husband.

Trover against husband and wife *ad usum ipsorum*.

HOLT, *Chief Justice*. Though in a declaration in trover against husband and wife, laying the conversion *ad usum ipsorum*, judgment was arrested, yet if it come in question again, it shall not be so by my consent.

Case 422.

Bully against Palmer.

A new charter granted in consideration of the surrender of an old charter, which surrender was not enrolled, is void.

THE PLAINTIFF brought an action on the case for a false return to a *mandamus*, commanding him to swear *Harris* to be mayor of the town of *Dartmouth*.

S. C. Salk. 190. Post. 253. Stra. 314. 1. Burr. 131. 3. Burr. 1327.

And a *peremptory mandamus* was moved for.

IT WAS RESOLVED by the Court, that if there be an old charter surrendered, but the surrender is not enrolled, and a new charter in consideration of the surrender granted, that the second charter is void; and if there be any other persons in the new charter than were in the old, any law made by them is void, because they act under a void charter: But *secus*, if it be the same members in the old charter, because then they act by their first charter, which is still good. So if in the first case they had given a bond, and

Michaelmas Term, 10. Will. 3. In B. R.

and put the seal of the new corporation to it, it would be void, as was adjudged in the case of *Bath and Wells*. But if the members of the old charter had gone to election, and some, by colour of the new charter, had voted with them against their will, there a choice by majority of the old charter with some mentioned in the new is good.

BULLY
against
PALMER.

Johnson against Nayler.

Cafe 423.

IT WAS A WRIT OF EXECUTION bearing *teste* in Vacation, and it was moved to have it amended; and the case of *Smith v. Harwood*, in new *Jones*, 41. and *Dyer*, 129. were cited; but THE COURT would not grant the motion.

Writ of execution not amended.

Anonymous.

Cafe 424.

PER CURIAM. If in case where the king's revenue or right is concerned, though there be evidence *pro* and *con*. yet if it be against the strength of evidence, it is fit for a new trial.

New Trial.
2. Stra. 1106.
1142.
3. Will. 39.

1. Will. 22. 1 Burr. Rep. 12. 54. 2. Burr. 665. 936. 1. Black. 1.

Anonymous.

Cafe 425.

THE COURT. If an attorney of the Court, upon motion, get his name struck out of THE ROLL, he shall never after be admitted to act as an attorney (a).

(a) See Kidwell's Case, B. R. H. Notes, 42, 43. *Ex parte* Cole, Dougl. 232. Mr. John Moody's Case, Barnes' 113, 114 *contra*.

Attorney.

Anonymous.

Cafe 426.

THE COURT. If a *rescous* be returned, an attachment shall go of course without motion.

Attachment.
Cro. Jac. 419.
3. Bolls. 198. 1. Roll. Rep. 388. 440. 3. Lev. 46. Cro. Eliz. 368. Gilb. P. C. 23. 1. Stra. 435.
5. Burr. 2814. Tidd's Pract. 771.

* Anonymous.

* [248]
Cafe 427.

LEAVE was granted to file AN INFORMATION against several plate-button makers, for combining, by covenants, not to sell under a set rate.

Information for combining not to sell under a set price.

HOLT, Chief Justice, It is fit that all confederacies, by those of a trade to raise their rates, should be suppressed.

4. Hawk. P. C. 7th edit. 85. 90, 91.

Baker against Chandler.

Cafe 428.

JUDGMENT AND EXECUTION thereupon were set aside, for that the plea was put in before the judgment signed.

Judgment for want of a plea.

Tidd's Pract. 309. 4. Term Rep. 370. 5. Term Rep. 152.

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Cafe 429.

Whitfield *against* Powel.

Prohibition.

3. Cro. 314.

1 Ld. Ray. 508.

4. Com Dig.

"Prohibition"

307.

Cafe 430.

Broom *against* Holford.

Amendment.

PROHIBITION granted to the spiritual court to stay a suit there for calling a woman "a pocky whore (a)."

(a) See Anonymous, ante, 236. and Grimes v. Lovel, ante, 242.

ACTION upon A PENAL STATUTE, and the sum mistaken in the declaration, and leave given to amend it, the writ being general.

Cafe 431.

Rowe *against* Nedham.

Satisfaction.

PER CURIAM. Judgment a good plea in satisfaction of a bond.

Cafe 432.

Shales *against* Seignoret.

Covenant to pay on assigning of Bank stock; tender of transfer should be the breach assigned.

2. C. 1. Ld. Ray.

440.

5. C. 1. Lutw.

316.

THE DEFENDANT covenanted with the plaintiff that he would pay him one hundred pounds in money, and give him credit for one hundred pounds more, upon the plaintiff's assigning him one thousand pounds stock in the *Bank of England*; and that the defendant would accept the same, upon notice, on or before the twenty-fourth of *May* next following.

In covenant, the plaintiff alledged notice to the defendant that the plaintiff would be ready to make the transfer on the said twenty-fourth of *May*, but that the defendant did not come to accept; and non-payment of money assigned for breach, &c.

* [249] And **PER CURIAM**, The breach is ill assigned, for they should assign for breach that they had tendered a transfer, * and that the defendant did not accept, for there was nothing to be paid but after transfer.

Cafe 433.

Anonymous.

A statute concerning revenue is public.

HOLT, Chief Justice. An act of parliament concerning, the revenue of the king is a public law; but it may be private in respect to some clauses in it relating to a private person.

Cafe 434.

Dennis *against* Roberts.

Venue.

ACT OF COMPOSITION, and a composition pursuant thereunto, was pleaded in bar to an action of debt upon a bond, without reciting the act, or laying *venue* for the composition; and for these faults

Judgment was given for the plaintiff.

Adam

Michaelmas Term, 10. Will. 3. In B. R.

Adams *against* Cox.

Case 435.

PER CURIAM. In *London* the plaintiff never excepts *against* bail, but there is an officer who receives bail; and if he take insufficient bail, upon complaint made to the aldermen he must either pay the debt, or the profits of his office are sequestered until the debt is satisfied. And when a cause is removed up hither, the bail and clerk below are discharged; and if the bail given below be offered here, they may be excepted *against*. Bail in *London* never excepted to.

White *against* Mullony.

Case 436.

A MATHEMATIC MASTER being offered for bail by the name of gentleman, Addition.

HOLT, *Chief Justice*, said, he was one by his profession.

Birch *against* Wood.

Case 437.

A VICAR libelled in the spiritual court for a stipend of four pounds a-year, claiming it by prescription. Stipend can be claimed by prescription by body politic or corporate only.

And a prohibition was moved for upon a suggestion, that none can claim a stipend by prescription but a corporation or body politic. S. C. Salk. 506.

And so said HOLT, *Chief Justice*; and that a sheriff, though removable at the will of the king, may claim a fee as incident to his office.

But *against* the prohibition were cited *Litt. Rep.* 19. and 51. * [250]

* The King *against* Dutton and Others, Printers. Case 438.

A N INDICTMENT being found *against* the defendants in *London* for printing and publishing a paper intitled "THE BLACK If a libel be couched in such terms that the Judges may conceive themselves the objects of it, the Court will remove the indictment, tho' found at *The Old Bailey*. "RAM," wherein certain persons were scandalously described, so as anybody that knew them might know them to be the persons described, and among others THE RECORDER OF LONDON was mauled;

And a *certiorari* was moved for by MONTAGUE, insinuating, that it would be a hardship to be tried at THE OLD BAILEY, where some of the Judges might take themselves to be scandal'd by that paper;

THE COURT said, that they seldom would grant a *certiorari* to THE OLD BAILEY: yet they granted one here, though it could not be tried here this Term; for a *certiorari* into a foreign country ought to have fifteen days between its *teste* and return; and though by consent it may be returned *immediatè*, yet still there must be fifteen days between the *teste* of the writ and the return of the jury, which could not be within this Term.

Michaelmas Term, 10. Will. 3. In B. R.

Case 439.

Anonymous.

There should be four days between the return of the *posse* and judgment entered.

PER CURIAM. Regularly there ought to be *four days* between the return of *THE POSSE* and judgment entered; that is, if there be four days of the Term unspent at the return; but if there be not so many days to come of Term, there ought to be the utmost time within the Term; but still judgment may be entered that Term.

Tidd's Practice, 578. 629.

Case 440.

Austen against Baker.

Assumpsit in consideration that *A.* would deliver goods to *C.* he *B.* would see him paid.

ASSUMPSIT against *Baker* upon a promise supposed to be made by him to pay for goods delivered by the plaintiff to *A.*

HOLT, Chief Justice, took this difference: If *B.* desire *A.* to deliver goods to *C.* and promise to see him paid, there *assumpsit* lies against *B.*; though in that case he said, at *Guildhall* he always required the tradesman to produce his books to see whom credit was given to. But if after goods delivered to *C.* by *A.* *B.* says to *A.* "You shall be paid for the goods," it will be hard to saddle him with the debt (*a*).

(*a*) By 29. Car. 2. c. 3. "No action shall be brought whereby to charge a person on any special promise to answer for the debt or default of another, unless the agreement upon which such action is brought shall be in writing." And it was formerly a rule, that where the undertaking was *before the delivery*, and there was a direction to deliver the goods and *I will see them paid for*, it is an *original undertaking*, and not within the statute, *per LORD MANSFIELD*, in *Mawbrey v. Cunningham*, Hilary 1773. But if (though before delivery) the promise is conditional, as if *B.* desire *A.* to deliver goods to *C.* and say, "I will pay you if *C.* does not," this is a *collateral undertaking* within the statute, *Jones v. Cooper*, Cowp. 228. And it is now determined, that there is no distinction between a promise made *before or after delivery*; and therefore where *B.* asked *A.* if he was willing to serve one *C.* and on *B.* replying

that he did not know *C.* said, "If you do not know him you know me, and I will see you paid," it was held a *collateral promise*, though made before the goods were delivered to *C.* *Matson v. Wharam*, 2. Term Rep. 80. And the general rule now is, that if the person for whose use the goods are furnished is liable at all, any other promise by a third person to pay that debt must be in writing, otherwise it is void by the statute of Fraud, 2. Term Rep. 81. *Read v. Nash*, 1. Will. 305. *Fish v. Hutchinson*, 2. Will. 94. *Burkemire v. Darnel*, 6. Mod. 249. And therefore if a tradesman deliver goods to *A.* at the request and credit of *B.* who says, before the delivery, "I will be bound for the payment of the money as far as 800l. or 1000l." this is a collateral promise on the part of *B.* if it appear that credit was given to *A.* as well as *B.* *Anderson v. Hayman*, 1. H. Bl. Rep. 120.

Case 441.

Anonymous.

A jury may have refreshment, but not at the expense of either of the parties.—7. Mod. 156. Tidd's Pract. 605.

PER CURIAM. If a jury eat and drink before giving their privy verdict, if it be not at the charge of the party for whom the verdict passes, it shall not be cause to set aside the verdict.

Anonymous.

* Anonymous.

Cafe 442.

APEREMPTORY RULE never ought to be put upon one without notice. Rule not to be peremptory without notice.

Kilbey *against* Weyberg.

Cafe 443.

ONE ATTORNEY having promised to accept a declaration from another, was compelled, upon motion and affidavit of the fact, to do it. Attorney.

The King *against* The Mayor of Exeter.

Cafe 444.

IT WAS HELD BY THE COURT, that a writ of mandamus ought to be delivered to him that is to make the return, and that is THE MAYOR in this case. Mandamus to be delivered to him who is to make the return.

S. C. ante, 27. S. C. 4. Mod. 33. S. C. 1. Show. 258. 364. S. C. Comb. 197. S. C. Holt, 169. 435. S. C. 2. Ld. Ray. 223.

Anonymous.

Cafe 445.

HOLT, *Chief Justice*. By the course of the Court, one bound to keep the peace ought to continue upon his recognizance for a year (a). Recognizance for the peace to continue a year.

(a) See *Rex v. Bowes*, 1. Term Rep. 696. and 2. Hawk. P. C. 7th edit. ch. 60. § 15. page 9.

Anonymous.

Cafe 446.

HOLT, *Chief Justice*. Upon an old issue there ought to be two Terms notice of trial. Notice of trial.

The King *against* Fox.

Cafe 447.

AN INDICTMENT for exercising a trade, not having served to it the space of seven years, *infra regnum Angliæ aut Walliæ*, was quashed for this exception, for it should be *aut Walliam*. Indictment: for exercising a trade, not having served thereto.

Anonymous.

Cafe 448.

PER CURIAM. If overseers of the poor, being convened before two justices to make their accounts, do refuse, the remedy is to appeal to the quarter sessions (a). Overseers.

(a) See 43. *Elia*. c. 2. § 4. ; the 17. *Geo*. 2. c. 38. § 4. and 5. *Rex v. Hedges*, Salk. 533. *Rex v. Bartlett*, Stra. 983. *Rex v. Whitear*, 3. Burr. 1365. *Rex v. Justices of Berkshire*, 1. Conft's P. L. 266. *Rex v. Micklefield*, 1. Conft's P. L. 268. respecting the appeal against overseers accounts; and *Rex v. Peake*, 1. Keb. 574. *Rex v. Churchwardens of Northampton*, Carth. 153. *Rex v. Carrock*, Show. 395. Anonymous, Salk. 525. *Rex v. Justices of Middlesex*, 1. Will. 125. and Mr. Conft's P. L. 258. respecting the making-up, delivery, and allowance of such accounts.

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Case 449.

Anonymous.

Bail special or common. **HOLT**, *Chief Justice*, Action against the master of a ship for embezzling goods he had on board, and he was held to *special bail*; but if it were for negligent keeping, *common bail* would
* [252] have done.

Case 450.

Beal's Case.

Attorney's person under the power of the Court. **BEAL**, an attorney of the Court, sued in the sheriff's court for his fees; and upon motion he was forced to refer it * to THE MASTER, for that his person is under the power of the Court.

Case 451.

Machill against Malton.

A man may be sued out of a diocese for subtraction of tithes within it. **MACHILL** had occupied lands in the diocese of *York* for seven years before, and had lived all his life at *Lincoln*; and at the end of seven years, being in the diocese of *York* as evidence, he was served with a citation for subtraction of tithes of those lands.

S. C. 2. Lutw. 1057. S. C. New Lut. 335. S. C. 2. Salk. 549. S. C. 5 Mod. 450. S. C. 3. Salk. 90. S. C. Carth. 476. S. C. 1. Ld. Ray. 452. 534. 13. Co. 4. Cro. Jac. 321. Cro. Car. 97. 162. Hard. 421. 1. Bac. Abr. 616. 6. Com. Dig. "Prohibition" (F. 9.). Fitzg. 110. **GENNER**, *Serjeant*, moved for a prohibition upon the statute of 23. Hen. 8. c. 9. against citations out of diocese, and quoted 13. Co. 6. Palm. 488. Hob. *Jones v. Jones*. 1. Ro. Rep. 328. SECONDLY, Executor in several dioceses cited in one, prohibition lies. If executor be to pay legacies in another diocese, where there are no *bona notabilia*, the way is to transfer the will thither, where the legatee lives. Godb. Rep. 191. 2. Brownl. 12.

On the other side were urged *Jeffrey's Case* (a) and *Dr. Blackmore's Case* (b). And he quoted an *Anonymous Case* about five years before in this court, where an executor being in a diocese, where out of his own, but where goods lay, was denied a prohibition, because citable in respect of the locality.

HOLT, *Chief Justice*. The question is, Whether an inhabitant of the diocese of *Lincoln* be citable at *York* for subtraction of tithes there? And he said, that if a will be proved in the prerogative court, let the executor be where he will, they of prerogative shall compel him to pay legacies; and that the mischief which occasioned the statute of *Henry the Eighth* was, that the prerogative courts of *Canterbury* and *York* used to cite subjects of all parts of *England*; and that if sentence be in the admiralty of *France*, they will transmit it hither, and the admiralty of *England* will execute it. And so is the usage of the civil law.

But here they granted a prohibition, because it was a doubtful case, that it might be settled.

And it was said at the Bar, that the canon law does not take notice of locality, but that with them all things are transitory; and therefore they might proceed in this case in the diocese of *Lincoln* (c).

(a) 5. Co. 64. 66.

(b) Hard. 421.

(c) See the words of the statute 32. Hen. 8. c. 7. that the party shall be

sued before the ordinary of the place where the subtraction was.—NOTE to the former edition.

NOTE.

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NOTE, In this case in *Hilary Term* after, upon deliberation
PER TOT. CURIAM, a consultation was awarded.

MACNILL
against
MALTON.

* [253]

* Piper against Dennis.

Case 452.

UPON a *quo warranto* against the town of *Liskardy* in *Charles the Second's* time, they surrendered their charter, which was not enrolled until *King James the Second*, who in consideration of the surrender granted a new charter to them.

A charter granted on a void surrender of a former charter is void.

It was held PER CURIAM, that the second charter, being in consideration of a void surrender, was also void.

By the charter surrendered none could be mayor if he were not a capital burghers, and one was made a capital burghers by the charter of *King James*, and after made mayor according to the old charter.

A person in possession of the office of mayor shall be deemed legally so till the contrary appear.

A question was started, Whether he were a legal mayor ?

HOLT, *Chief Justice*, and THE COURT, said, You should first have moved him from being a capital burghers ; for if we find one in actual possession of an office, we shall intend him to be rightful officer until the contrary appears ; as if *merè laicus* be presented, &c. to a benefice, we shall take him for a clerk until first steps be annulled (a).

S. C. Holt, 170.

(a) See the case of *Alton Wood*, 1. Co. Bully v. Palmer, ante, 247. and Lord v. 40. Jenk. 251. 2. And. 154. Hughes Francis, post. 408.—NOTE to former Ent. 162. Berwick s Case, 5. Co. 93. edit on.

Morrice against Green.

Case 453.

IN TRESPASS FOR ASSAULT AND BATTERY, upon demurrer tendered by the plaintiff, without any imparlance, the judgment was thus, “ *et præd. G. non venit, &c.*”

Whether on demurrer tendered without imparlance, *non venit* is a judgment by default, or on *nihil dicit*.

CARTHEW moved, that this was a judgment by default, when it should be *nihil dicit* ; for a default cannot be without imparlance, for without imparlance he was not demandable ; and the entry should be, “ *et dictum fuit per Cur. quòd jungat ad morationem, et si ipse nihil dicit, &c.*” And this is manifest from the constant practice in case of *common recoveries*, where the judgment is ever by default ; and therefore they are forced to grant a general imparlance ; by which suit is put in suspense, and then the defendant is demandable.

S. C. 3. Salk 213.

NORTHEY contra. It is a judgment upon *nihil dicit*, and *non venit* must be understood *non venit ad jungendum in moratione*.

And HOLT, *Chief Justice*, inclined that way ; but said, they would not be positive. And he said, that upon a *nihil dicit* one shall never take advantage of ill pleading, because there is no issue in law ; but upon joinder in demurrer it is otherwise.

Case 454.

* Anonymous.

Scire facias against several, *J*UDGMENT against several defendants, and a *capias*, an ' 2
against several, *cepi corpus* returned as to one ; then another of the defendants
where one dies, dies, and he that was in execution escaped, and a *scire facias* against
and one escapes. the survivor, the terretenants of the deceased, and him that had
escaped.

And *PER CURIAM*, It may well be ; but *FIRST*, the *scire facias*
ought to suggest that he had escaped.

And *SECONDLY*, It ought to be *de terris et tenementis* of the
terretenants of the deceased ; and *de terris et tenementis, et bonis,*
et catallis, of the survivors.

Case 455.

Parker against Flint.

Trinity Term, 9. Will. 3. Roll 363.

A house for the reception of *BY* the statute of 4. & 5. Will. & Mary, c. 13. s. 18. intitled,
boarders and "An Act for carrying on a War with France," it was enacted,
lodgers, with "That constables should quarter soldiers upon innkeepers, and
stabbling for their "such as keep alehouses and victualling-houses, livery-stables, or
horses, is not an "sell brandy, metheglin, or cyder, by retail : " In an action
inn, or alehouse, brought by the plaintiff against a constable for quartering a horse
or public house, and dragoon upon him, he pleaded not guilty, being an officer, and
on which soldiers gave the statute in evidence. The jury found, that there are
can be quar- wholesome wells at *Epsom*, and that the plaintiff, during the season
tered. for drinking the waters, indefinitely *dimisit conclavia*, *ANGLICE*,
S. C. Holt, 366. *let lodgings* to such as went thither to drink the waters, for the
S. C. 1. Ld. Ray. 479. air, or for their pleasure, and did dress victuals for them, and sell
S. C. Saik 387. them ale and beer, and entertained their horses at eightpence *per*
S. C. 5. Mod. *diem*, but sold no victuals, drink, &c. to any but the lodgers ;
427. that the plaintiff had no licence from any justice of peace to sell
S. C. Carth. 417. ale ; and that the defendant did billet a soldier and a horse upon
the plaintiff, who compelled him to find victuals for himself, and
provision for his horse, for the space of two months ; *et fi, &c.*

Resolved *PER CURIAM*, That the plaintiff's house was not a
house within the description of the statute :

FIRST, It was no inn ; for the verdict finds he let lodgings
only, which shews him not compellable to entertain anybody, and
that none could come there without a previous contract ; that he
was not bound to sell at reasonable rates, or to protect his guests ;
but contrary it is in all the said points in the case of an innkeeper,
and an action shall lie against him for default, not by the name * of
* [255] *hospitat.* but of *communis hospitiat.* (a)

SECONDLY, It is not an alehouse or victualling-house, for those
extend only to such alehouses and victualling-houses as are known

(a) Vide Reg. 105. Mo. 877. Hely, 49. Fitz. tit. Hostler. Bro. Action
for Case, 76. 5. Edw. 4. f. 2.

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and described by several acts of parliament, which it is a crime to keep without licence; and it must be a *communis taberna*, wherein drink, &c. is *communiter* sold to all the king's subjects (a); and the verdict finds that the plaintiff only sold to lodgers.

PARGEN
against
FLINT.

THIRDLY, It was resolved to be a statute against the liberty of the subject, for before it no man was obliged to entertain soldiers against his will, as appears by the Petition of Right (b) and the statute of 21. Car. 2. and therefore not to be construed favourably without great necessity.

FOURTHLY, That in this case, the constable having wrongfully quartered a dragoon upon him, he was answerable for all the damage he had committed.

Constable
wrongfully
quartering sol-
diers to answer
all the damage.

NOTE, In this case HOLT, *Chief Justice*, held, that if one come to an inn, and make a previous contract for lodging for a set time, and do not eat or drink there, he is no guest, but a lodger, and as such is not under the innkeeper's protection; but if he eat and drink there it is otherwise; or if he pay for his diet there, though he do not take it there. And a sign is not essential to an inn, but is an evidence of it.

A person may
hire lodgings at
an inn, and so
not be a guest.

NOTE LIKEWISE, It was said by WRIGHT, *Serjeant*, that an innkeeper cannot sell ale indefinitely without licence (c). And an innkeeper, as such, cannot be a bankrupt, because he does not sell but utters his provision (d).

An innkeeper can-
not be a bank-
rupt.

Judgment was given for the plaintiff.

- (a) West's Precedents, 71. Lamb. Newton v. Trigg, 1. Salk. 110. Saunderson v. Rowles, 4. Burr. 2065.—But see Vaughan v. Pittman, 1. Term Rep. 572. Bulcall v. Hogg, 3. Will. 146.
(b) 3. Car. 1. c.
(c) Dalton J. 32, 33.
(d) Crisp v. Pratt, Cro. Car. 549.

The King against Beechcroft.

Case 456.

AN INDICTMENT FOR EXTORTION against an officer for taking money for not carrying his prisoner to a spunging-house (a); and THE COURT looked upon it to be so ill a practice, that they would not hear a motion to quash it.

Indictment for
extortion not
quashed on mo-
tion.

(a) See 32. Geo. 2. c. 28. s. 13.

Anonymous.

Case 457.

PER CURIAM. If rules of pleading be not delivered, though the declaration be of another Term, yet the *venue* may be changed.

Venue changed.

* Anonymous.

Case 458.

HOLT, *Chief Justice*. It is against the trust reposed in the Court to let judgment be entered of another Term than it is given; and it would be an intolerable mischief to men's estates.

Judgment must
be entered as of
the Term it is
given.

Anonymous. Tidd's Pract. 313. 631. 692.

Michaelmas Term, 10. Will. 3. In B. R.

Case 459.

Anonymous.

The appointment of a constable must shew that he is an inhabitant. **A**N ORDER for making a constable quashed, *absente* HOLT, Chief Justice, for that it did not appear by the order that he was an inhabitant of the liberty, though of the parish.

Old constable not discharged till new one sworn. The late constable is not discharged till the new be sworn, because the parish cannot be without an officer.

Case 460.

Ashton's Case (a).

Where persons are doing an unlawful act, if murder ensues all are guilty. **H**OLT, Chief Justice. Two, three, or more, are doing an unlawful act, as abusing the passers-by in a street or highway, if one of them kill a passer-by it is murder in all; and whatever mischief one does, they are all guilty of it; and it is lawful for any person to attack and suppress them, and command the king's peace; and such attempt to suppress is not a sufficient provocation to make killing manslaughter, or *an assault demeine* a good plea in trespass against them.

(a) At Nisi Prius.

Case 461.

Anonymous.

Authority. **H**OLT, Chief Justice. If A. employ B. to work for C. without warrant from C. A. is liable to pay for it,

Case 462.

Anonymous.

Executor not liable for funeral expences. **A**N EXECUTOR is not liable to pay for funeral expences without he contracts for it (a).

(a) But see 3. Inst. 202. Burn's E. L. 3d edit. 249.

Case 463.

Fanshaw against Harris,

A contract "from the day of the date" is exclusive of the day of the date. **A** POLICY OF INSURANCE was, that the defendant undertook to pay the plaintiff one hundred pounds if Sir Robert Howard lived a twelvemonth from the day of the date of the policy (a), being the third of December 1697, and he died the third of December 1698.

S. C. 1. Ld. Ray. 489. And HOLT, Chief Justice, directed the jury to find for the plaintiff. And he said, If a man be born on the third of December, and die the second of December twenty years after, making a will on that day, it would be a good will.

(a) See 1. Ld. Ray. 280. 2. Ld. Ray. page 435. to 469. and the case of Pugh v. The Duke of Leeds, Cowper, 714. Jourdain's

Michaelmas Term, 10. Will. 3. In B. R.,

Jourdan's Case.

Case 464.

INFORMATION was filed against *Jourdan*, an ensign of the guards, for rescuing one arrested by a Chief Justice's warrant in *the Park*. Information for a rescue in *the Park*.

* [257]

* Beckman's Case.

Case 465.

HE was personated as bail in an action; and **NORTHEY** moved to vacate the record upon affidavit, which did not make the fact clearly out. Where bail is personated, record may be vacated.

HOLT, *Chief Justice*. If it had manifestly appeared to be a trick, we would relieve you; but the case being doubtful, we cannot vacate the record, but you may have your action. 1. Hawk. P. C. 7th edit. 393.

NORTHEY. Then you will then order by rule, that we may plead it to a *scire facias* against us, according to 2. *Cro.* 256.

But *negatum fuit*.

Anonymous (a).

Case 466.

MOTION was made for an attachment for non-performance of an award. There must be personal notice, and a demand of the money, to bring a party in to contempt for not performing an award.

And **PER CURIAM**, There must be a positive affidavit of personal notice of award and demand of the money all at one time, because it brings the party into contempt; but if the party keep out of the way on purpose, there must be an affidavit thereof, and of endeavour used to find him out and serve him; and it is but of late that attachments have been the means to compel performance of award; but the old remedy was case (b).

(a) This case was in the court of common pleas.

(b) See *Rex v. Tooley*, post. 372.

Neal against Spencer.

Case 467.

AN ACTION ON THE CASE for arresting the plaintiff without cause of action.

And **PER CURIAM**, Action lies not, if it be not that he was held to *excessive bail*; and of that opinion is **HALE** and **VAUGHAN** against **HOBART**.

LEVINZ at the Bar said, he knew it adjudged in my **LORD HALE**'s time, that an action would lie for arresting one, *ubi nihil debuit vel saltem non tantum*, and holding him to excessive bail (a). An action on the case for arresting without cause of action will not lie, unless he be held to excessive bail. Post. 273.

And **TREBY**, *Chief Justice*, cited *Reeves's Case*, soon after the Restoration, where it was held by the Judges, in opposition, as

(a) See *Daw v. Swaine*, 1. Sid. 424. *Skinner v. Cuntar*, 1. Saund. 228. *Saunders v. Roberts*, 1. Salk. 13. *Atwood v. Monger*, Stiles, 378. *Goslin v. Wilcox*, 2. Will. 302.

he

Michaelmas Term, 10. Will. 3. In B. R.

NEAL
against
SPENCER.

he believed, to OLIVER's Judges, that it would not lie for arresting without cause, and holding to special bail ; but the contrary had been adjudged since.

And judgment here for the defendant.

"*quod cum, &c.*,"
good in case,
but bad in tref-
pass.

AN EXCEPTION had been taken to the declaration, that it was "*quod cum, &c.*"

POWELL, *Justice*, said, most of the precedents in case were so ; but without doubt it would be bad in trespass.

BLENCOW and TREBY, *Justices*, said, they could see no difference.

* [258]

Cafe 468.

* Walker *against* Walker.

General *indebitatus* will not lie for money won at play.

S. C. ante, 69.

S. C. 5. Mod.

73.

S. C. Comb. 303.

S. C. Holt, 328.

3. Lev. 119.

6. Mod. 128.

7. Salk. 22. 125.

2. Bac. Abr. 15.

620.

Fitzg. 302.

Cowp. 37.

7. Term Rep.

616.

Kyd on Bills,

400.

INDEBITATUS ASSUMPSIT generally for money won at play ; and verdict ; and general damages ;

AND MOVED *in arrest of judgment*, that it would not bear an action upon the implied consideration of winning or losing, without more special words ; and it being for play, it is no more than a *nudum pactum* (a).

And PER CURIAM, In case of play upon tick there must be a special mutual promise ; but it has been held, that upon evidence they need not prove a special mutual promise, because the nature of the thing implies one ; but it must be set forth in pleading.

And PER CURIAM, The statute shall be construed largely in odium of gamesters ; and therefore if one lost upwards of one hundred pounds to two at one sitting, both the sums would be void : but if one lose ninety-nine pounds to A. and then, on purpose to avoid it, loses twenty pounds to B. there A. may specially set out the fraud, and so avoid it (b).

Judgment was given for the defendant.

(a) See the case of Jackson v. Colegrave, Michaelmas Term, 3. Will. 3. Mary, Roll. 610. Carth. 338. and 1. Sid. 394. 2. Vent. 175. where it is adjudged, that *indebitatus* will not lie on

such a promise implied.—NOTE to former edition.

(b) NOTE NOC. Vide Crouch's Case, Michaelmas Term, 11. Will. 3. post. 336.

HILARY

HILARY TERM,

The Eleventh of William the Third,

IN

The King's Bench.

Sir John Holt, Knt. Chief Justice.

Sir Thomas Rokeby, Knt.

Sir John Turton, Knt.

Sir Henry Gould, Knt.

} *Justices.*

Sir Thomas Trevor, Knt. Attorney General.

Sir John Hawles, Knt. Solicitor General.

* [259]

• *Wiggan against Branthwaite.*

Case 469.

Hilary Term, 10. Will. 3. Roll 332.

TRESPASS FOR TAKING GOODS. The case was: The A manor to which wreck belonged by prescription came to the king's hands, who granted to *A.* the office of high admiral of England to the Lord Viscount *L'Isle*, "with all wrecks at sea, and all other profits to the said office being longed;" and after this he grants the manor, &c. to *B.* under whom the said plaintiff in the action claims. "the office of admiral, with all wrecks at sea, and all profits to the said office being longed;" this does not pass the wreck appurtenant to the manor.

THE COUNSEL for the defendants urged, that the wreck being granted to Lord *L'Isle* before, and not recited in the grant to *B.* it did not pass by the grant of the king to *B.* and therefore the plaintiff had no title.

BUT HOLT, Chief Justice, over-ruled this on evidence at the trial in *Suffolk*, that the wreck belonged to the manor by prescription, and could not pass as appurtenant to the office of high-admiral.

And
S. C. Holt, 753.
S. C. 1. *Ld. Ray.*
473.
Vaugh. 159.
5. Co. 106.
2. Inst. 168.
2. Will. 23.

HiLLARY Term, 11. Will. 3. In B. R.

WIGGAM
against
BRANTH-
WAITE.

And it being moved to have it found specially, it was refused ; and a *bill of exceptions* was tendered and sealed, and a *writ of error* brought, and error assigned.

* [260]

It was argued by HAWLES, *Solicitor General*, and WHITAKER, that besides the grant of wreck appurtenant to the office of high-admiral, there is also a grant of *maris ejusla*, which is not relative to the office, and will comprehend a grant of all wreck then in the hands of the king ; and the restraining clause of "*eidem spectant.*" "*et pertinent.*" shall not * relate to the wreck of sea granted ; for wreck cannot belong to the office by prescription, for the office itself is within time of memory.

But by HOLT, *Chief Justice*, Wreck may be claimed by prescription, and may belong to the lord-admiral by prescription ; for the lord-admiral's office is an antient office, *tempore dont*, though it might not be vested in a single person, or in the same manner as it is now. In *Dyer*, 152. *b.* there is a prescription for the lord-high-admiral to grant the office of "Register of the admiralty" for life ; and he made no doubt but some wreck might belong to the admiral by prescription ; as that about the cinque ports, and such places where he was most conversant in antient time. And as to the objection, in regard that there is but one *concessit*, or word of grant, all the clauses shall be taken to be dependant on it, and the clause of restraint shall extend to all of them ; otherwise if there had been any word of grant intermediate.

And the judgment was affirmed.

Case 470.

Pollard *against* Awker.

A custom cannot be tried in the spiritual court.

LIBEL IN THE SPIRITUAL COURT by the clerk of a parish for fourpence a-year due to him by *custom* from every master of a family in the parish. The defendant denied the custom ; and a prohibition was granted, because a custom is not triable there, except in the case of a pension.

Case 471.

The Inhabitants of King's - Langley *against* The Inhabitants of St. Peter's, in St. Alban's.

Sessions may adjourn matter for further debate.

EXCEPTION was taken to an order made at the quarter-sessions, because the appeal was lodged at the next quarter-sessions, and it appeared on the face of the order that it was not then determined, but was adjourned over for further consideration.

S. C. 2. Salk. 605.

S. C. Sett. & Rem. 120.

S. C. Fort. 323.

S. C. 1. Ld Ray. 481.

And it was held by THE COURT, that one must appeal to the next quarter-sessions ; yet it may be adjourned over on debate for further consideration.

And it was confirmed.

Lacy

* Lacy against Williams.

Case 472.

Michaelmas Term, 10. Will. 3. Roll 586.

ERROR OF A JUDGMENT given in the court of common pleas (*a*) in ejectment; and a special verdict was found, *viz.* That *W. Lacy* the younger, being tenant in tail male, in the seventh of *November*, in the second year of *William and Mary*, *G. Keith* sued out a writ of entry *sur disseisin* of the lands in question against *Miles Corbet*, returnable *quind. Martini*; at which time *Miles Corbet* appeared and vouched *W. Lacy* the younger, who was not present in court; upon which a *summoneas ad warrantizandum* issued, tested the twenty-eighth of *November*, in the second year of *William and Mary*, returnable *octab. Hill.* after; after the issuing forth of which writ, and before the return of it, *W. Lacy* the younger, by lease and release first and second of *January*, conveyed the lands to *Miles Corbet* to make him a complete tenant to the *præcipe*. *Miles Corbet* (*b*) appeared at the return of the summons *ad warrantizandum*, and entered into the warranty; and a recovery was had to the use of *William Lacy* and his heirs; afterwards he died without issue male, leaving the lessor of the plaintiff, his daughter and heir; and the defendant claimed as brother and heir in tail-male.

If the tenant gain the freehold any time before judgment, it is good.

S. C. 2. Salk. 568.
S. C. Comb. 425.
S. C. Carth. 472.
S. C. 1. Ld. Ray. 227. 475.
S. C. Holt, 614.
Cro. Jac. 455.
Lutw. 1549.
Carth. 472.
Show. 347.
1. Mod. 218.
Noy, 126.
Pigott, 29.
Cruise, 18 to 21.

The single question was, Whether this common recovery, in which there was no tenant to the *præcipe* when the summons *ad warrantizandum* issued, but made pending the writ of summons, and before the return, be good?

It was argued in the king's bench by *PRATT* for the plaintiff in error, and *KEEN* for the defendant; and the judgment was affirmed.

For by *HOLT, Chief Justice*, The general rule is, if a man gain the freehold after the writ purchased, at any time before judgment, this makes the writ good; for why should the recovery be bad, but because it is against a man who had nothing at the time of the recovery had? But here he has. In a *scire facias* against terretenants, after a recovery, they ought to plead that the tenant had nothing in the land *die impetrationis brevis, nec unquam postea*, and without that it is ill. If the vouchee come in and counterplead the voucher, *per non-tenure* of the tenant, he ought to say, "*die impetrationis brevis, nec unquam postea*;" so if the tenant plead "*non-tenure*" in abatement: but if the tenant come in by act of law, pending the writ, as by descent, he ought to plead specially; and as the writ is made good by a subsequent purchase, so the voucher is made good by a subsequent entry into warranty by the vouchee; so there is a good tenant, a good vouchee, and a good * recovery. And as to the cause of action, the defendant may have a good cause of action, though the tenant has

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(a) See S. C. 1. Ld. Ray. 227.

(b) W. Lacy.

Hilary Term, 11. Will. 3. In B. R.

LACY
against
WILLIAMS.

not the lands, for the right of the demand is the cause of the action; and therefore, if the tenant has the land to tender before the judgment, it is good (a). Judgment was affirmed.

(a) By the statute 14. Geo. 2. c. 20. s. 6. a recovery is good if the freehold be conveyed to the tenant to the *præcipe* by the end of the term, sessions, or assizes, in which the recovery was suffered, and the persons joining in such recovery had a sufficient estate, and power to suffer the same.—And a recovery has been held good, although the tenant did not acquire the estate until after the day on which the writ of seisin was returned to have been executed. *Burton v. Rigby*, 2. H. Bl. Rep. 46. 5. Term Rep. 177. And indeed as common recoveries are now considered as common assurances, the Courts will endeavour, by every possibility, to support them, *Atkins v. Horde*, 1 Burr. 115. *Selwin v. Selwin*, 1. Bl. Rep. 254. *Martin v. Strachan*, 1. Will. 73. *Crowe v. Baldwin*, 5. Term Rep. 112.

Case 473. The King against Sudbury, Heaps, and Others.

Two persons cannot be guilty of a riot.

2. Hawk. P. C. 7th edit. c. 65.

THE DEFENDANTS were indicted, for that they *riotosè et routosè assemblaverunt*, and so assembled committed a battery on *Mary Russell*. Two of them were found guilty, and all the others were acquitted; and judgment was arrelled, for two cannot commit a riot.

But by *HOLT, Chief Justice*, If the indictment had been, that the defendants, with divers other disturbers of the peace, had committed this riot, and the verdict had been, in this case the king might have judgment.

Case 474.

Jevelson against Moor.

Hilary Term, 9. Will. 3. Roll 430.

A declaration that the plaintiff was possessed for a term of years of a colliery situate in the parish of *A* near to the King's highway leading through the said parish of *A* and that the defendant, to hinder the carriage of the coals, obstructed the said highway aforesaid, by which the plaintiff totally lost the benefit of his said colliery, &c. is good, although no specific injury be particularly stated; for although the defendant was guilty of a public nuisance in obstructing a common highway, and for such offence could only be punished by public prosecution, yet, as a special damage was occasioned thereby, he is liable to a civil action at the suit of the party injured, and the quantum of damage sustained is for the consideration of the jury on the evidence; at least the omission of stating the particular injury is cured by the verdict.—*S. C.* 1. Salk. 15. *S. C.* Comy. Rep. 58. *S. C.* 1. Ld. Ray. 486. *S. C.* Comb. 480. *S. C.* Carth. 451. *S. C.* Holt, 10. *Co. Lit.* 56. 5. *Co.* 73. 2. *Black. Com.* 219, 220. 2. Will. 53. *Sira* 666. *Bull. N. P.* 7. *Burr.* 2424.

(a) See the pleadings, 2. Salk. 730. and 3. Ld. Ray. 436.

On

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On not guilty, verdict for the plaintiff; and, upon motion in arrest of judgment, a rule made *Curia advisare vult* indefinitely.

JERSON
against
MOOR.

THE COURT argued *seriatim*.

And FIRST, they all unanimously agreed, that this being in a highway, and consequently a public nuisance, no action would lie for it, generally speaking; but if any person had a particular damage, which would distinguish his case from that of all * the rest of the king's subjects, they held that an action would lie for him; if he laid his damage specially enough to support his action.

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And GOULD and TURTON, *Justices*, held the plaintiff had done so here, especially it being after verdict.

GOULD, *Justice*. This declaration is special enough, even upon demurrer, *à fortiori* after verdict. Indeed if the plaintiff had only said, "*per quod* his carriage could not pass that way," that had been bad; because that is a common damage with the rest of the king's subjects; and, at that rate, every one that had occasion to pass that way would have his action, which would beget such a multiplicity of actions as the law will not endure; but here he says, "*per quod* he lost the sale of his colliery;" and that is special. 1. *Roll. Ab. pl. 8. 7. Hen. 7. 3. Godbolt, 343.* The stopping of a way may be a general or a special damnification; and the question is here, Whether *per quod* has done its office? It is objected, that it does not appear that the plaintiff lost any buyer; but I answer, that when a man lays a special damage to maintain his action, he need not, many times, set forth the precise certainty thereof; as if a master bring trespass for beating his servant, he cannot recover if he do not shew a special damage, as loss of service, yet he need only say "*per quod* he lost his service *per magnum tempus*," and that is well enough; for the quantum of time there is not traversable. 1. *Leo. 136. Hob. 284. 9. Co. 53.* In an action for a private nuisance, the plaintiff concluded *ad nocumentum* of his house, without shewing content, and good; for it is to recover damages only. So here it is not necessary to instance who the buyers were; for it appears, FIRST, that the coals there were ready for sale; SECONDLY, That the way was stopped, whereby, &c. There is a difference where the damage is the result of one single instance, as loss of marriage, which cannot be but to one single person, there it ought to be ascertained who that person was; but where the damage is complicated of many instances, as here, it is otherwise; and it would be inconvenient if it were not; for it might be impossible to tell who his customers were to have been; and if he had named some and failed in the evidence of proving a loss of any of them, he must have been nonsuited; and he would be so restrained to them mentioned in the declaration, that he could give evidence of none other. But it is otherwise on an indictment for barratry (a);

Bull. N. P. 78.

(a) See 1. Term Rep. 732. 734.

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JEVISON
against
Moon.

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you may give more or less particulars in evidence than you have mentioned; because that only raises or lessens the fine, but here it is to have damages from a jury. SECONDLY, This is * against a wrong doer; in which case this general way of declaring has prevailed in all the courts in *Westminster Hall*; for there it is not necessary to make a title to the plaintiff further than generally, "that he was possessed, &c." As for depriving one of his common, *vide* 9 Hen. 6. 42. 45. 27. Hen. 6. 1. 1. Vent. 274. Trinity Term, 27. Car. 2. Roll: 501. 1. Rol. Ab. 63. pl. 31. 1. Cro. 510. 11. Hen. 4. pl. 44. b. Hilary Term, 8. Will. 3. Roll 316. in *C. B. Baker v. Moon*; and so is *Hart and Basset's Case*, 2. Jones, 156. Allen, 22. 1. Leo. 236. Style, 107. 1. Vent. 13. Eating grass *cum averiis*, good, without more.

TURTON, Justice. An action will not lie without special damage; for "Action sur Case" 6. Nuisance 1. Cro. Eliz. 664. 5. Co. Williams's Case. Vaughan, 335. 340, 341. 9. Co. Mary's Case. 2. Cro. 446. 1. Rol. Ab. 888. 1. Inst. 56. Keb. Menrell and Saltmarsh's Case. SECONDLY, If special damage be sufficiently alleged, the quantum of them is not material. FIRST, Here it appears that the plaintiff had a colliery exposed to sale; SECONDLY, That this was the way through which his customers used to come and go; THIRPLY, That the defendant *malitiosè*, &c. did stop this way; FOURTHLY, That the plaintiff thereby lost the sale of his coals: and he relied upon 1. Rol. Ab. 104. And he said that the verdict would aid it at all events; and for defects cured by verdict he quoted 1. Keb. 847. 2. Saund. 250. 1. Vent. 114. 126. Jo. 125. 232. 1. Rol. Ab. 63. 2. Cro. 565. Cro. Car. 510. 1. Rol. Ab. 88.

ROKBY, Justice. This action will not lie without special damages for two reasons: FIRST, Because it is a general injury to the whole body of the kingdom, and therefore the action is given only to the king, who is the head. SECONDLY, Because of the multiplicity of actions that would ensue, if every one might have an action that is stopped of this way. But when an action is upon the special damage, it ought to be so certainly alleged, as that the Court may be satisfied that it is a special damage. And here if the *per quod* had been omitted, it had been undoubtedly bad, for that had been but a general injury; and though the *per quod* seems to have two things, *viz.* the loss of the sale, and also the lessening the value of the coals, yet in truth all is but one, *viz.* the loss of the profit of his colliery. If there had been a sufficient cause of action without the *per quod*, the uncertain laying damages under the *per quod* would not vitiate. It is not said that any particular person intended to buy, and by reason of this stopping forbore it; and he compared it to the case in 3. Bulstrode, 75. where the plaintiff had laid in his declaration, that he purposed to settle land * upon his son, and to let part to tenants; and that the defendant did slander his title, whereby, &c.; and the judgment was arrested, because he had not shewn in certain any who had forborn being

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being his tenant upon that account. And suppose the case of *Hart v. Bassett* to be law, it is not like this; for there was an actual damage *in presenti*, but here is only a potential damage; because it may be the customers would not have come if the way had not been stopped; or if they had come, it may be he had not agreed of the price with them. But it is objected, they could not name their customers, because they could not know them. I answer, it is for that reason they ought not to have damage, because they do not know what damage it has done them; and they would have recovered something for perhaps nothing.

JEVISON
against
MOON.

HOLT, Chief Justice. The action will not lie generally. But two questions are in this case: FIRST, Whether the plaintiff may have this action in this case generally, in respect of the proximity of his colliery to the highway? SECONDLY, Whether the special damage be so laid as to maintain the action? As to THE FIRST, The action will not lie for the proximity; for though the way be more convenient for him, than to others of the king's subjects, yet he has no more right to the way than the rest of the king's subjects, and therefore is no more intitled to an action for the stopping generally than another; and this is the reason of *Finiaux v. Hovedon* (a). Every man who brings an action for an injury, it must bear proportion to the right which he has; as where one has common belonging to his house or ground, or a way to his house or ground. 2. Saund. 115. A seised of a mill in a town, and B. seised of another mill in the same town, and a prescription, that inhabitants should come to one or the other of the mills, as they pleased, if inhabitants come to neither they both must join in the action, in respect of the right which is in common; and an action must always be managed according to the right; and this highway was made for all the king's subjects.

SECONDLY, There is no particular damage, for the offence is stopping the highway; and if the defendant had been indicted for this, the indictment would conclude "*ad commune nocumentum omnium subdit. domini regis per illum viam transeun.*;" and without doubt the count would have been bad without the *per quod*; and it is not like the case put by my BROTHER GOULD, of diverting a water-course from a mill; for the plaintiff had a particular right in the * water-course to his mill; and so was the case of *St. John v. Moody*; it was for stopping a private way, and the *per quod* did not make the *gīt* of the action: But in all general nuisances, where the action is particular, the *per quod* makes the *gīt* of the action; and there it must be made certain. The case of 27. Hen. 8. is law, if rightly understood; that is, an action will lie according to *Fitzherbert* if special damage be laid, as it was not in that case; and according to BALDWIN, it will not lie without special damage, as that case was; and so is 1. Inst. 56. And the special damage must be more than hindrance of passages; as falling in,

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(a) 3. Cro. 664.

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JERVISON
against
MOON.

breaking hand, or leg, &c. and I always understood it so. It is objected, that he lost his customers, and that that is particular. I answer, such a precedent overthrows all the Books, which agree that damage must be specially alledged; for the damages must support the action; and therefore they must shew some particular customer whom this stopping hindered to come. As to the case in 1. *Roll. Ab.* 63. it would be in point, but I have always heard it denied to be law; and the same author, in the case of *Fell v. Brewer* (a), says, that loss of customers is no special damage in such a case; but where words, &c. in themselves are actionable, such an allegation with a *per quod* is good, in aggravation of damages. 2. *Roll. Rep.* 79. 1. *Roll. Ab.* 36. 1. *Cro.* 140. 2. *Bulst.* 276. where one was said to be incontinent, whereby none would marry him, and not good; but he should name somebody who refused upon that account; and there is no diversity between the principal case and an action for words which in themselves are not actionable; for in both cases there must be a special damage. This is like the case of *Paint v. Parterick* (b), and *Menel v. Saltmarsh* (c). The first case was thus: There was a town which maintained a wherry for all passengers paying toll, and a custom that the inhabitants of the town should pass *gratis*; and the person, whose ferry it was, gave over keeping it, against whom one of the inhabitants brought his action: the custom was adjudged good, but it was held that the action would not lie, and that the defendant was only punishable by indictment; and that there was no more special damage to the inhabitants of the town than to any other, by the *cesser* of the ferry, *viz.* the not passing; and that passing free was only consequential. In the case of *Menel v. Saltmarsh*, the corn was rotten because he himself could not bring it home; and the case of *Hart v. Bassett* (d) is a weak case, but still the declaration there was better than this; for it appears that the plaintiff was a farmer of tithes, and was liable to an action if he suffered the tithes to lie on the land beyond a convenient time; and that he was also put to great expence. If an action be made maintainable for such imaginary damages, it would overthrow the maxim in law, that an action does not lie for a common nuisance; and if the plaintiff cannot tell whose custom he lost, he cannot shew that he lost any thing; and the action is always in lieu of the loss.

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What shall be
done when the
Judges are di-
vided after a
Cur. ad vult.

Then the question was, the Court being thus divided, How judgment should be?

And by HOLT, *Chief Justice*, if the division had been on the first motion in arrest of judgment, before any rule made, the plaintiff must have had judgment; but here is an *advifare vult* indefinitely, and so judgment cannot be entered without continuances; and while the Court is divided, it continues an *advifare vult*. If the rule had been temporary and expired, the matter

(a) *Roll. Rep.* 36.
(b) 3. *Mod.* 289.

(c) 1. *Keb.* 847.
(d) 2. *Jones*, 156.

had

Hilary Term, 11. Will. 3. In B. R.

had been at large. But he said a writ of error lay, and therefore there must be judgment one way or other. But let it stay; *et sic pendet*. Judgment was stayed (a).

JAYESON
against
Moor.

But in the case of *Philips v. Ryand*, *Easter Term*, the eleventh year of *George the First*, the Chief Justice said it was reversed by the opinion of all the Judges in the exchequer chamber.

(a) It is said, that by the consent of *HOLT*, Chief Justice, this case was argued before all the Justices of the common pleas and Barons of the exchequer at Serjeants Inn; and they were ALL OF OPINION for the plaintiff, that the action well lay. S. C. 1. Ld. Ray. 495.

Grant against Burton.

Case 475.

SCIRE FACIAS against bail, who plead no *capias* issued against the principal; the plaintiff replied, that there did, *prout patet per recordum* in this court, and prays that the record may be inspected. The defendant demurred, *quia male conclusit* his replication.

Prout patet per recordum cannot be replied after issue joined. Ante, 215.

And IT WAS MOVED for the plaintiff, that the demurrer might be set aside, because the defendant tendered an issue, and the plaintiff joined with him, and pleadings were at an end; and nothing remained but to inspect the record.

Creamer v. Wickett.

Quod CURIA concessit, and the demurrer was set aside.

Harvey against Williams.

Case 476.

Hilary Term, 10, Will. 3. Roll 160.

IN *indebitatus assumpsit*, the defendant pleaded *quod ante exhibitionem billæ* the plaintiff became a bankrupt, whereby he became unable to discharge the defendant, because the said money, from such time as he became a bankrupt, was due to such creditors as should sue out a commission: on demurrer, judgment for the plaintiff, for this is no plea.

Bankruptcy of the plaintiff cannot be pleaded to an *indebitatus assumpsit*.

S. C. 1. Ld. Ray 496.

2. Term Rep. 117.

* The King against Harris.

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Case 477.

AN INQUISITION of forcible entry into the rectory of *Lanticeant* in *Glamorganshire* was taken the eighteenth of *October*, in the seventh year of *William the Third*, 1695, and restitution presently granted, which was soon after set aside by a *vi laica removenda*; and the tenth of *December* 1691, a new restitution was granted, on which the inquisition was removed by *certiorari* into the king's bench, and several exceptions taken to the inquisition.

On forcible entry, restitution granted after three years set aside.

S. C. Carth. 496. S. C. 1. Salk. 260.

S. C. 3. Salk.

313. S. C. Holt, 324. S. C. 1. Ld. Ray. 440. 482. S. C. Comy. Rep. 61. S. C. 5. Mod. 443.

Hilary Term, 11. Will. 3. In B. R.

THE KING
against
HARRIS,

FIRST, That it was *presentatum extitit* in the preterperfect tense.

HOLT, *Chief Justice*. That would be fatal if *extitit* were necessarily in the preterperfect tense; but there is an old verb called *extito* which may have *extitit* in the present tense.

THE SECOND was to the caption, which said, they *jurat. et onerat.* but does not say with what.

And this stuck with the Court. *King v. Faulker (a)*, and *Chaloner v. Chaloner (b)*.

And IT WAS RESOLVED, that a *vi laica removenda* could only remove the force, but not meddle with the possession.

But then it was further strongly objected, that the second restitution upon the inquisition was irregularly obtained, because the justices of the peace had executed their power by putting the party into possession immediately after the inquisition taken, and could not grant a new restitution afterwards.

But by HOLT, *Chief Justice*. If possession be delivered upon *habere facias possessionem*, or grant of restitution, and it is avoided immediately by a new force, there the party may have a new *habere facias possessionem*, or grant of restitution; but if after the restitution awarded the party enjoy quiet possession, and he be removed by a new force, there he ought to resort to a new remedy.

SECONDLY, It was argued, that the grant of the second restitution was not good, because it was not granted in convenient time; for the intent of the statute of *Hen. 6.* was to give speedy remedy; or at least after such delay, as there has been here, there ought to be some process to renew the inquisition, upon which the party might come in and shew what he can say why restitution should not be granted; for the possession might have become lawful by subsequent conveyance; and this is agreeable to the reason of the law; for in personal actions after a year and a day, at common law, the party could not have execution upon any judgment, but was to put his action of debt on his judgment, till the statute of *Westminster the Second* gave him a *scire facias*; and in real actions he must have a *scire facias*. In criminal cases also, if execution be deferred, * the prisoner must be brought to the bar before a rule is made for his execution.

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Kely. 13.

1. Lev. 61. acc.

To which HOLT, *Chief Justice*, agreed, and cited *Knightley's Case (c)*, who had judgment of death for high treason pronounced against him in *Easter Term*, and execution was countermanded, and mean while *Trinity Term* past; and there being orders from above for his execution, in the long Vacation all the Judges met

(a) 1. Saund. 249. 2. Keb. 506.

(b)

(c) Holt, 398. Comb. 364.

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at *Serjeants Inn*, and it was agreed by them all, that without being called to the bar first he could not be executed.

THE KING
against
HARRIS.

And *HOLT*, *Chief Justice*, was of opinion, that if *Trinity Term* had come, though not past, it would have been the same thing.

And *THE COURT* here, after consideration, were of opinion that restitution ought to be granted, by reason of the long delay which might be a great inconvenience and prejudice to purchasers; and they grounded this resolution on *Dr. Bonham's Case* (a).

HOLT, *Chief Justice*, ordered a special entry to be made, that because it appeared on examination that restitution was not awarded till three years after the inquisition, therefore restitution granted to *Harris*.

(a) 8. Co. 119.

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The City of London against Vanacre.

Case 478.

UPON a *habeas corpus* directed to the mayor, aldermen, and sheriffs of London, to remove the body of *Vanacre*, with the cause of detaining him, they returned, that the city of London is an ancient city, and county of itself, and that the citizens of London, *temps dont*, have been a body politic, known by divers names; that *King John*, by his charter, granted to them the shirewick of London and *Middlesex*, and that they should make out of themselves whom they pleased sheriffs; that *MAGNA CHARTA* and divers other statutes confirm all their liberties; that they have a custom to make by-laws; and that if any of them be defective or difficult to be understood, or if any matter arise for which a convenient remedy was wanting, the common-council may take orders touching the same; that time out of mind there has been a court of record before the mayor and aldermen in the inner chamber of *Guildhall*. Then they return an act of common-council, made 7. Car. 1. which repeals all former by-laws touching the election of sheriffs, and appoints that the election shall be the twenty-fourth of June yearly; and if in the interim there shall be a vacancy, then at such time and place as the lord mayor and court of aldermen shall appoint; and that no freeman of the city so elected shall be exempted from the execution of the office, unless he voluntarily take an oath before the court of aldermen, that he is not worth ten thousand pounds; and bring six compurgators with him, such as the lord mayor and aldermen shall approve of, to swear that they believe what he has sworn is true; and that if any freeman elected sheriff, and proclaimed on the hustings in the presence of the lord mayor and six aldermen, or in his absence before eight aldermen, shall not come to the next court of aldermen and declare his consent, and enter into dermen, attend the next court and declare his acceptance of the said office, and give bond in 1,000l. to perform it, he shall forfeit 400l. to be recovered in the mayor's court of the city, is a good by-law S. C. 5. Mod. 438. S. C. Saik. 142. S. C. Carth. 480. S. C. Holt, 431. S. C. 1. Id. Ray 496 City of London v. Wood, post 676. Snow. 95. Burr. 1829. 1831. 1. Will. 275.

T 4

a bond

Hilary Term, 11. Will. 3. In B. R.

THE CITY OF LONDON ^{against} YANACRE. a bond of one thousand pounds to the chamberlain, to appear at the vigil of *St. Michael*, and to accept the office, not having a reasonable cause to be allowed by the lord mayor and court of aldermen, shall forfeit four hundred pounds, one hundred to be paid to the next sheriff that shall hold; the rest to the use of the mayor and commonalty; to be recovered in the court of record held before the mayor and aldermen. Then the return sets forth, that the defendant was chosen and proclaimed, &c. and for his default, &c. a plaint was levied, &c.

HOLT, *Chief Justice*, delivered the opinion of THE COURT, that the by-law was good, and a *procedendo* ought to be granted.

The principal objections against the by-law may be reduced to four.

Of common right every corporation may make a by-law concerning a franchise granted to them. And THE FIRST is, that the subject matter, concerning which this by-law is made, is not within the custom of the city; for the shirewicks of *London* and *Middlesex* is granted within time of memory, and therefore not within a custom, which is immemorial: and besides, the shirewicks of *Middlesex* is out of the jurisdiction of the city, and therefore their by-law cannot extend to it. As to the first part of this objection, that no by-law can be made about this franchise, because granted within time of memory; I answer, that admitting the custom will not warrant such a by-law, yet it may be made of common right; for of common right every corporation may make a by-law concerning any franchise granted to them, because it is for the welfare of the body politic (a), and included in the very act of incorporation. *Hob. 211.*

A corporation has a power for the better government of the place, to make by-laws. SECONDLY, Every corporation has a power to make a by-law for the better government of the place, which is the very touchstone by which all by-laws are to be judged: Now, if it be for the advantage of the king and people to have substantial persons serve in this office, this by-law on that account is good. *The Chamberlain of London's Case (b)*. An act of common-council was made, that all citizens and strangers* who should expose any cloth to sale in the city of *London*, should bring it first to *Blackwell-Hall*; and held a good by-law both as to the citizens and strangers, because it was for the credit of the market and public good.

If a charter obliges a corporation to appoint a sheriff, they have a power to compel the acceptance. THIRDLY, The very constitution of *King James's* charter obliges the citizens to make by-laws concerning this election; for the franchise is not only granted to them, but that they shall chuse out of themselves whom they please to be sheriffs. Now it would be in vain to give them a power to appoint the sheriff, if they have not a power to compel those whom they shall appoint; and the acceptance of the charter obliges them to perform the terms on which it was given: And as every citizen is capable of

(a) See *Strange*, 462. and 1. *Burr.* (b) 5. *Co.* 62.

Hilary Term, 11. Will. 3. In B. R.

the benefit of the franchise, so he must submit to the charge also. *Bret v. Cumberland* (a). And he took it that this franchise is an advantage to the city, for in *King Charles the Second's* time a surrender of it would have compounded for their franchise.

THE CITY OF
LONDON
against
VANACRE.

FOURTHLY, If they do not make such an election as the letters patent appoint, it is a forfeiture of the franchise; for all franchises are granted on condition that they shall be duly executed according to the grant; and if they neglect to perform the terms, the patents may be repealed by *scire facias*; therefore it is necessary that they have a coercive power to compel persons to take the office upon them without custom, or else the franchise would be lost to the city: But admitting it could not be good without custom, yet he was of opinion that the by-law was warranted by the custom, though the subject matter of it had its original within time of memory; for general customs may be extended to new things which are within the reason of those customs. *Snelling's Case* (b) is an authority in point, where, by the custom of *London*, executors may pay debts, *viz.* simple contracts, in equal degree with bonds; and adjudged that administrators were within the custom, though created by 31. *Edw. 3.* within time of memory, because within the same reason. As to the objection, that he may be indicted for this refusal, as was the case of *Larwood*, sheriff of *Norwich*, I answer, that will not be sufficient to hinder the forfeiture of the franchise; for if there should be a refusal when the sheriff comes to be sworn, then there will be a vacancy, and an obstruction of justice: besides, the penalty of the by-law is for refusing to declare before-hand whether he will hold at the time, which is not indictable, and not for refusing to take the office upon him at the time. As to the part of the objection, that they cannot make a by-law * about the shirewreck of *Middlesex*; I answer, though the execution of the office is without the city, yet the interest of the franchise is within the city, as being a franchise belonging to them, and therefore within their jurisdiction; for it is their property, and vested in them as the body politic of the city; the persons to be chosen are citizens, and all acts necessary to be done towards it, as appearance, &c. are done in *London*.

If do not make election, it is a forfeiture of the franchise.

General customs may extend to new things which are within the reason of those customs.

Though may be indicted, yet liable to pay the forfeiture.

* [272]

THE SECOND OBJECTION was, that it is unreasonable to impose an oath on the party, and more unreasonable to find six compurgators, and to be such as the lord mayor and aldermen shall approve of. But I answer, this is an ease to them from a burthen, for every citizen was originally compellable to serve; and this excuses them if they swear themselves not worth ten thousand pounds, which they are not compelled to do; it is a voluntary oath, which is not against law. 3. *Cro.* 469. 1. *Sid.* 283. And as to the having six compurgators, it is but in imitation of the common

(a) *Cro. Jac.* 399. 521. S. C. *Poph.*
136. S. C. 3. *Buist.* 163. S. C. *Godb.*
176. S. C. 1. *Roll. Rep.* 359. S. C.
2. *Roll. Rep.* 63.

(b) 5. *Co.* 82.

Hilary Term, 11. Will. 3. In B. R.

THE CITY OF LONDON *against* **VANACRE.** law; for though the Books mention twelve, yet the course of the common pleas is to have but six; and it is reasonable the mayor, &c. should have the refusal of them, that they be not infamous persons.

THE THIRD OBJECTION is, that the person chosen is obliged to appear at the next court after his election, under the penalty of four hundred pounds, without a reasonable excuse, to be allowed by the mayor and aldermen. I answer, whatever excuse he makes, if they allow it, the city is bound by it; and if they refuse to allow a reasonable excuse, it is not final; for it may be pleaded or given in evidence in an action brought for the penalty by the city; for it was not the meaning of the common-council to put an arbitrary power in the lord mayor and aldermen, but is like the power given by the statute of 23. Hen. 8. c. 5. to commissioners of sewers, to do several things according to their discretion; but that must be understood of a legal discretion. 5. Co. 100.

Every citizen obliged to take notice of election, for are virtually present.

THE FOURTH OBJECTION, That no provision is made for the party elected to have notice; and he may be in the country at a great distance, or beyond sea. I answer, every citizen is supposed to be an inhabitant, and dwelling there, and present at all public meetings; and if he be not, it is his own neglect, of which he shall take no advantage. And as to the objection, that all freemen are not present at the election, but only liverymen, I answer, It does not appear by the return that the election is made by liverymen, but must be intended to be by all the citizens; but admitting it was, every citizen is obliged to take notice of what they do, because they represent the whole; they are virtually present, and must take notice, as all people do of * parliament acts. The election of sheriff is a notorious act, and the proclamations of it on the hustings are public: in a *præcipe quod reddat* summons on the land is sufficient: so proclamation in the county court in case of an outlawry, though the party be removed into another county. If a man think he is liable to be chosen, and is at York, he may get somebody to inform him of it, and to go to the court of aldermen to give him time to appear; otherwise such citizens at the time of election would get out of the city, on purpose to avoid being chosen.

* [273]

Wherefore judgment that a *procedendo* should go.

Case 479.

Robins *against* Robins.

Case formally decided holding to special bail without cause, the man for which he was arrested should be shown.

ACTION ON THE CASE: The plaintiff declared, that the defendant *prætextu et colore cujusdam medii processû in lege arrestari cauavit* the plaintiff, and held him to special bail without cause; on not guilty, and verdict for the plaintiff, —S. C. 1. Salk. 15. S. C. 1. Ld. Ray. 503. S. C. Ray. Ent. 446. Ante, 257.

It

Hilary Term, 11. Will. 3. In B. R.

IT WAS MOVED *in arrest of judgment*, because the writ is not shewn on which the arrest was, nor is it averred by whom he is prosecuted; whereas it ought to have been shewn more certainly and specially, *viz.* that he owed the defendant but so much, and that the defendant, intending to oppress him, had caused him to be arrested for so much, and to be held to special bail; but here it does not appear to the Court that the sum for which he was arrested required special bail, which being the point of the action ought to be shewn at large. And whereas it was objected, that this matter could not be specially shewn, because the writ remains in the hands of the officer, I answer, The plaintiff might have moved the Court that the sheriff might have returned the writ, and then all would appear. Besides, the warrant under the hand of the sheriff to the bailiff would be good evidence (a).

ROBINS
against
ROBINS.

(a) The judgment was accordingly Dougl. 215. 2. Term Rep. 225.
arrested, S. C. 1. Ld. Ray. 504. — See 3. Term Rep. 183.
also 2. Will. 305 376. Comy, Rep. 190.

Cremer against Wickett.

Cafe 480.

Easter Term, 11. Will. 3. Roll 456.

IN AN ACTION OF FALSE IMPRISONMENT the defendant pleaded a misnomer in abatement by attorney; the plaintiff demurred.

If a defendant
plead a misno-
mer *by attorney*,
it is good cause
of demurrer.

And exception was taken to the plea, because misnomer cannot be pleaded by attorney; for he having put in his warrant of attorney in the name by which they declare against * him, he shall be estopped by his warrant to say, that he is known by another name (a).

S. C. Carth. 517.
S. C. 1. Ld.
Ray. 550.

* [274]

HOLT, *Chief Justice*, was of opinion, that this was good cause to refuse the plea, but not cause of demurrer; it is no error in the Court to admit one by attorney that ought not. And as to the estoppel he said, that the entry of it on the roll was not the warrant of attorney, but only a memorandum of it, which was introduced by WRIGHT, *Chief Justice*, in *King James the Second's* time, for before they were on a roll by themselves, and so they ought to be still; and upon conference with the rest of the Justices judgment was given *quod billa cassetur*.

Et per GOULD, Justice, If the plaintiff would take advantage of the estoppel by the warrant of attorney, he ought to have relied on it, and relied on it (b).

(a) See Brook. Abr. "Misnomer" 5. 66. Fitz. Nat. Brev. 27. Theolal's Digest, 365. b. and the case of Britton v. Gradar, 1. Ld. Ray. 117.

(b) The Judges said, that they would consult with their Brothers to the end that this point might be settled; and afterwards, at another day, by the whole Court judgment was given *quod billa cassetur*, S. C. 1. Ld. Ray. 509.

Harper

Hilary Term, 11. Will. 3. In B. R.

Case 481.

Harper *against* Davys.

On new trial the record must be of the Term the plea was entered.

S. C. Carth. 498.
S. C. 1. Ld. Ray. 510.

ASSUMPSIT. The plea was entered in *Easter Term*. The memorandum was of a bill entered in *Hilary Term*. On issue joined, it was tried by *nisi prius*, and the verdict was set aside, and a new trial granted, and tried this Term in *London*. In the new *nisi prius* roll the *placita* were of this Term; and that the party appeared and pleaded this Term, and verdict thereon.

And now judgment was arrested, because the issue on the plea-roll is of *Easter Term*, and the new trial is but a continuance of the same cause; and so the record of *nisi prius* differs from the plea-roll; and so adjudged in the case of *Dubarteen v. Chancellor (a)*.

(a) Ante, 189. S. C. 5. Mod. 399. S. C. Carth. 447. S. C. 1. Ld. Ray. 329.

Case 482.

Sir William Lacon Child *against* Harvey.

Where the day in bank is before the day of *nisi prius*, it is not amendable.

S. C. 1. Salk. 48.
S. C. Carth. 506.
S. C. 1. Ld. Ray. 511.
2. Wils. 144.

SCIRE FACIAS upon a recognizance to pay money at a day certain; *solvit ad diem* pleaded; and issue joined; and verdict, at *nisi prius*, for the plaintiff.

NORTHEY moved to set it aside, because the *distringas* and *jurata* were returnable *a die Sanctæ Trin. in tres septimanas nisi*. **JOH'ES HOLT, &c.** 27 Junii prius vener. which 27th of June was the day after *tres Trin.*

But the award on the plea-roll being *tres Mich.* it was moved to amend this mistake of the clerk, because in all cases in which there is a record to amend by, and the amendment does not alter the point in issue, the Court may give leave to amend; here the award on the roll is right, so is the issue: and the Judge of *nisi prius* had authority to try the cause by the statute of *Westminster the Second*, c. 30. which requires only that a day * and place certain be appointed in the shire; and this is a plain misprision of the clerk, in writing "*tres Trin.*" for "*tres Mich.*" 1. Cro. 595. 2. Cro. 353. *Dyer*, 260. and the *Case of Sir R. Barnard (a)*.

* [275]

HOLT, Chief Justice, though the day of return of the *posita* should be mistaken, yet if the cause was tried on the right day it would be good; but here the day of *nisi prius* being an impossible day, and the authority of the Judge confined to it, a trial on another day will be without authority, and therefore not amendable. If the *distringas* and *jurata* had been right, the *nisi prius* roll might have been amended (b), as was in *Sir R. Barnard's Case*.

Wherefore here the trial was set aside.

(a) Mich. Term, 8. Will. 3.

(b) See the statute 5 Geo. 2. c. 13.

Bond

Hilary Term, 11. Will. 3. In B. R.

Bond *against* Spark, Coleman, and Hunt.

Case 483.

ASSAULT AND BATTERY: Issue joined on *son assault de-
mesne*; two were acquitted, and *Sparks* found guilty; and
it was certified by the Judge to be against evidence; and motion
for a new trial.

New trial not
to be, unless
against all.

BUT THE COURT said, a new trial could not be granted except
against all. Whereupon the attorney for the defendants consented
for the two defendants who were acquitted, that they should
undergo a new trial, and quit the costs which they might have
from the plaintiff on their acquittal; and *Sparks* consented to pay
the plaintiff costs.

And so a new trial was granted against all (a).

(a) See *Collier v. Morris*, Bull. N. P. and 2. Burr. 1224. 1. Bl. Rep. 298.
326. *Parker v. Godin*, 2. Stra 814. Tidd's Pract 608.

Doctor Brookbanck *against* Allenfon.

Case 484.

DOCTOR BROOKBANCK, chancellor of *Durham*, issued
a citation *ex officio* against *Allenfon* for incontinency, and that
she should be personally served with it; and if it could not be so,
then to fix it, on a *Sunday*, on the church-door; and it was so done,
and she was *excommunicated* for not appearing.

A citation is-
sued by the
chancellor of a
diocese against
a person for in-
continency, may
be served on a
Sunday, not-
withstanding
the 29. Car. 2.
c. 7.

HER COUNSEL moved for a *prohibition*; because by 29. Car. 2.
c. 7. no process shall be served on a *Sunday*; and that by that sta-
tute this citation is void.

S. C. 2. Salk.
625.
S. C. 5. Mod.
450.
S. C. Carth. 504.
1. Stra 387.
1. Term Rep.
Bl. Rep. 9.

BUT THE COURT was of opinion it was good, and proper to
be executed on that day; and that the statute 29. Car. 2. c. 7.
did not forbid the execution of such process as could not be but on
Sunday; and so it is in the case of a summons in real actions (a);
and if by the ecclesiastical laws process is to be served on a *Sunday*,
the general words of this statute will not take it away.

265. 3. Term Rep. 642. 4. Term Rep. 557. 5. Term Rep. 25. 1. H.

(a) See *Taylor's Case*, post. 667. and Burr. . .

• *Michell and his Wife against* Garrett.

* [276]
Case 485.

CASE by husband and wife for a cause arising before marriage;
the defendant pleads, that the plaintiffs *nunquam legitimo
matrimonio copulat. fuerunt*; replication, that they were married at
such a time and place; demurrer.

Ne unque acouple
in matrimony no
plea in personal
actions.

And judgment for the plaintiff; because the plea was naught;
for in personal actions you must lay the matter on the fact of the
marriage to make it triable by the country, and not upon the right
of the marriage, as in appeals and real actions.

Espin. Dig. 124,
125.

Yates

Cafe 486.

Yates against Fettiplace (a).

Portion devised out of land, payable at a future day; if the person to whom payable dies before the day of payment, it is sunk; *aliter* out of personal estate.

A SEISED of lands in fee had issue a daughter, and by his will he charged the lands with five thousand pounds for her portion, to be paid at her age of twenty-one years, or day of marriage, and dies; the daughter dies at six years of age; second husband of the daughter's mother takes out administration to the daughter and to mother his wife.

THE QUESTION was, Whether he should have the five thousand pounds, or whether it should be sunk for the benefit of the heir?

S. C. 2. Vern. 416.
S. C. Prec. Ch. 140.
S. C. 2. Eq. Ab. 541. 653.
S. C. 2. Freem. 243.
S. C. 1. Ld. Ray. 508.
1 Vern. 321.

And my Lord Chancellor SOMERS decreed for the heir; and held, that in all cases where a man charged a sum certain to be paid, as here, out of the real estate, there, if the person die, the money shall be sunk for the benefit of the heir; but if a man devise a personal legacy, or a sum to be paid out of a term for years; and the legatee die before the age, &c. the executors or administrators of the legatee shall have the money, because it was *debitum in presenti*, though *solvendum in futuro* (b).

2. Vern. 92. 417. 424. 439.

(a) This case was in the court of chancery.—AND NOTE, The report of this case in 2. Vern. 417. is, as to the state of it, different. NOTE to former edition.

(b) See 2. Peer. Wms. 276. 610.
3. Peer. Wms. 138. Brown. Chan. Cases, 123.

Cafe 487.

Hilliard against Gennings.

A devise to A. and his heirs, and if he die without issue of his body or under twenty one years of age, remainder to B. &c. passes an estate-tail determinable on the event of A dying under the age of twenty-one.

THIS was an issue directed out of chancery, to be tried in a feigned action, whether *Thomas Gennings* the younger, by any last will in writing, devised to *William Hilliard* the plaintiff.

Upon a special verdict it was found, that *Thomas Gennings*, husband of the defendant, was seised in fee of the lands in question, and had issue by the defendant *Thomas Gennings, junior*, his only son, and two daughters, *Mary* and *Elizabeth*, who are now living; that *Thomas* * the father made a will the twenty-seventh of *December* 1679, in these words, "I DEVISE to my son *Thomas Gennings*, and his heirs for ever, all that my manor of *Earnesly*, which I lately purchased of *H. W.* but if it shall happen that my said son shall die before he attain the age of twenty-one years, or without issue of his body lawfully begotten, then my said land shall be divided between my said daughters, *Mary* and *Elizabeth*, and their heirs for ever" That the father died seised as aforesaid; that *Thomas Gennings* the son entered and became seised *prout lex posuit*, and being above the age of twenty-one years made his last will the seventh of *April* 1695, in the presence of *A. B.* and *W. Hilliard* the plaintiff, and they subscribed their hands as

* [277]
S. C. 2. Eq. Ab. 508.
S. C. Carth. 514.
S. C. 1. Ld. Ray. 505.
S. C. Comy. Rep. 50.
S. C. Freem. 509
Cro. Eliz. 525. Cio. Jac. 250. Raym. 452. 3. Lev. 70. Hob. 29.

witnesses,

Hilary Term, 11. Will. 3. In B. R.

witnesses, in the presence of the testator, whereby he devised the said lands, to the plaintiff *William Hilliard*, and his heirs; that *Thomas Gennings, junior*, was also heir to his father; that on the eighteenth of *May* 1695, he died seised without issue of his body.

HILLIARD
et al
GENNINGS.

And it was urged by *CARTHEW* for the plaintiff, that *Thomas Gennings, junior*, had all the fee in him, and therefore might well devise to the plaintiff; for the word "or" shall be construed "and;" so that the remainder could not vest till *Thomas Gennings* died without issue, and under the age of twenty-one years of age; and to make another construction would be to defeat the intent of the devisor; for he meant that the issue of his son should inherit before his own daughter; but if "or" shall not be construed "and," then if the son has issue, and dies before the age of twenty-one, such issue shall not inherit, which is expressly contrary to the intent of the devisor; then the remainder limited over would be void. *Cro. Eliz.* 525. 1. *Vent.* 62. 1. *Leo.* 74.

But by *HOLT, Chief Justice*, There is no necessity to construe "or" as "and" in this case; for it might be the design of the father to hinder him from marrying till his age of twenty-one years; and as for the case in *Cro. Eliz.* that was adjudged to be an estate-tail.

But to this point THE COURT gave no opinion; and afterwards *HOLT, Chief Justice*, denied that case to be law (a).

But THE SECOND POINT was, Whether this was a good will within the statute of Frauds and Perjuries, 29. *Car.* 2. c. 35. the devisee being one of the three witnesses?

A devisee cannot be a witness to the will.

3. *Mod.* 263.

And THE COURT were of opinion, that for this reason the devise was void; for every day's experience shews that the devisee cannot be a witness to prove that will; and the intent of the act was to prevent people from setting up forged wills, which would be frustrated, if devisees should be allowed as witnesses of their own will (b).

Judgment was given for the defendant *nisi causa*; and in *Hilary Term* the rule was made absolute.

(a) See *Frammingham v. Broad*, 1. Will. 140. 3. *Atk.* 390. *Right v. Hammond*, 1. *Stra.* 429. *Barker v. Surtees*, 2. *Stra.* 1174. *Befworth v. Edwards*, 2. *Vezey*, 240. *Fearnese C. R.* 334.

(b) See the statute 25. *Gro.* 2. c. 6. f. 1.

also on this subject *S. C. Carth.* 514. *Wyndham v. Chetwynd*, 1. *Burr.* 414. 424. and *Holdfast on the Demise of Anstey v. Dowling*, 2. *Stra.* 1253. *Baugh v. Holloway*, 1. *Peer. Wms.* 557. *Price v. Lloyd*, 2. *Vezey*, 374. and *Kindson v. Kearsley*, 4. *Burn. E. L.* 86.

E A S T E R T E R M,

The Eleventh of William the Third,

I N

The Common Pleas.

Sir George Treby, Knt. Chief Justice.

Sir Edward Neville, Knt.

Sir John Powell, Knt.

Sir John Blencowe, Knt.

} *Justices.*

Sir Thomas Trevor, Knt. Attorney General.

John Hawles, Esq. Solicitor General.

* [278]

Case 488.

* Scattergood against Edge.

THE CASE found by special verdict was: *Ralph Edge* being seised in fee of the manor of ——— in *Norfolk*, did by will bearing date in the thirty-sixth year of *Charles the Second*, devise the manor to ———, serjeant at law, for *eleven years*, upon several trusts. Afterward in the will were these words; ITEM, I give and bequeath my said manor of ——— to the first issue male of *George Jakes*, and the heirs males of his body; and for default of such heirs males of his body, to the second issue male of *George Jakes* and the heirs males of his body; and for default, &c. to the third issue male, &c. and so to the fourth; PROVIDED they shall respectively take upon themselves the surname of *Edge*; and if they shall not take upon them the surname of *Edge*, or shall die without issue male, as above, then to the first issue of *G. Convey* (who at the time of the devise had issue a son) "with limitation, as above, to the second, third, and fourth son of *George Convey*, and same proviso as above; and if they shall not assume the name, &c. then to *Paul Edge* for life, and of the devise, and expiration of the term: the devise to the issue of *A.* is void, and the issue of *B.* shall have the estate (a).—S. C. 1. Eq. Abr. 189. S. C. 1. Salk. 229. Cath. 2. Salk. 238. Show. 91. 3. Brown. C. C. 396.

(u) Cases T. T. 145. 150. 2. Will. 225. 4. Burr. 2157. 3. Term Rep. 86. after

Easter Term, 11. Will. 3. In C. B.

"after to the heirs males of his body; remainder to the right
"heirs of the devisor."

SCATTERGOOD
again?
Book.

George Jakes had no issue at the time of the devise, and died without issue; the lease for years expired; the issue of *George Convooy*, who was in being at the time of the devise, entered and took upon him the name of *Edge*; upon whom the plaintiff, the heir at law of the devisor, entered, whom *Edge* ousted; and upon that this ejectment was brought.

THIS CASE was argued *seriatim* by the Bench.

BLENCOWE, *puisne Judge*, argued for the plaintiff.

POWELL and NEVILLE, *Justices*, and TREBY, *Chief Justice*, for the defendant.

* BLENCOWE, *Justice*. It is a rule in the construction of wills to support the intent of the testator as far as it can be made consonant with the rules of law; but here it is plain that it cannot be maintained in all respects; and therefore there remains only to consider, what clauses in the will may be made good agreeable to law, and what cannot, and so retain the one and reject the other. And FIRST, It is very clear that the devise for eleven years is good, because it is to commence immediately after the devisor's death; and the last clause of devise to *Paul Edge*, it is not in question; but the whole question is, Which of the two devises, *viz.* that to the first issue of *George Jakes*, or that to the first issue of *George Convooy*, should stand? for they are incompatible, and cannot both subsist. If the devise had been "to *Serjeant* ——— for eleven years, with remainder to the first issue of *Convooy*, being then *in esse*," it had been unquestionably a good remainder. So if the devise to the first issue of *George Jakes* be void, the devise to the issue of *George Convooy* is good; so we must consider this case, as if *George Jakes* had issue now, on one side of the Court, contesting with the first issue of *Convooy* about this estate, upon this will. It is a rule, that, in all devises of this nature, we consider what may, or might have fallen out, and not what does fall out. A devise of a term to *A.* for life, and after to *B.* for life, and to *C.* for life, is good, if they be all *in esse* at the time of the devise; and if it be made to the heir of one of them, all subsequent trusts or limitations are void, because that would tend to a *perpetuity*. The like rule of executory devises of land. But if the contingency be necessarily to take effect in *reasonable time*, as upon two or three lives, it will be good; contrary, if it be to continue for many generations. Executory devises are not assignable or barrable.

* [279]

The second devise here to the issue of *George Convooy* cannot possibly be good; for I hold the first is good; and consequently, by rule of executory devises, and contingent trusts of term, the second cannot be good; see the case of *Pell v. Brown* (a). In-

(a) 1. Eq. Abr. 187. Cro. Jac. 590. Bridgm. 1. 3. Palmer, 232. 2. Roll. Rep. 196. 216. Godb. 282.

Easter Term, 11. Will. 3. In C. B.

SCATTERGOOD ^{against} deed, if the first devise by intent of the lessor were to pass a present ^{issue:} interest, it would be void, because there was none *in esse* to take it; and then the second would be good. It appears that at the time of the devise *George Fakes* had no issue, but *George Convey* had one; and we ought to intend the devisor knew this, for two reasons: FIRST, Because it is improbable one would devise lands to one that he did not know * whether he were *in esse* or not; and SECONDLY, If he were in being, he would devise the land to him by his name, and not by description of "first issue male," which is the usual term when the party is not *in esse*; and therefore I conceive he intended it as an executory devise, and therefore good.

* [280]
4. Burr. 2162.

The case of (a), a devise to such of the daughters of *J. S.* as should marry a *Norton* within fifteen years. So a devise to a son unborn by name of "first issue;" and the devise of the trust of a term to "the first son of *A.*" by limitation was adjudged good. 1. *Rol. Ab.* 612. which authority was cited by *HOLT, Chief Justice*, in the *Duke of Norfolk's Case* (b); and by *LORD NOTTINGHAM* in his argument of the case of *Cotton v. Heath* (c); nor do I find that this authority was ever questioned, nor is there any difference between it and our case. Where there is an intervening limitation that would make a perpetuity, it shall be void, and the subsequent may be good: and for this the case of *Cotton v. Heath* is a full authority. In *Blandford's Case* (d) the limitation was to a person not *in esse*, for three years after there was a child born, who by the judgment of the Court had title to the estate; and trusts of terms and devises ought to receive the same construction. Nor is the possibility in our case a remote one; for it must be in the life of *George Fakes*, or at most within forty weeks after, which I do not look upon as a distinct space from his life, but rather an appendix of it; and the possibility in the case of *Bates v. Amerst* (e) is more remote; and if this be a good devise to the issue of *George Fakes* by the first constitution thereof, it cannot be vitiated by matter *ex post facto*.

POWELL, Justice, agreed with the rule put by *BLENCOWE, Justice*, concerning the construction of wills; and that neither of these devises could take by way of remainder, for want of a particular estate to support them. So THE FIRST QUESTION will be, Whether the remainder to *George Fakes's* issue be good? SECONDLY, If not, whether that to the issue of *Convey* be so? and THIRDLY, If both be void, Whether the plaintiff has title as heir at law? And he likewise agreed with *BLENCOWE's* notion, that this case ought to be considered as if the contest were now between the issues of *Fakes* and *Convey* upon this

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| (a) Raym. 115. 82. | (d) The Case of <i>Blandford v. Blandford, Moor, 846. Cro. Jac. 394.</i> |
| (b) 1. Eq. Abr. 192. 2. Chancery Cases, 1. Pollensfen, 223. 2. Chancery Reports, 229. | 3. Bull. 98. 1. Roll. Rep. 318. Godb. 266. |
| (c) 1. Eq. Abr. 191. 3. Chancery Cases, 29. Pollensfen, 26. | (e) 4. Eq. Abr. 212. Raym. 82. |

will.

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will. And he said, it seemed plain that the devisor intended that the issue of *Jakes* should be preferred; but he conceived such intent was inconsistent with the rules of law; for it could not be but by way of executory devise, and that would not do, as this case stood. * In inheritances there may be two sorts of executory devises: FIRST, When a devisor parts with the whole fee out of him, and afterwards qualifies the estate of the devisee, and limits contingent remainders over; and this is repugnant to the rules of common law, to have one fee depend upon another (a). By the act of the party one fee cannot depend upon another; tho' it may by act in law; as it is often seen since the statute of 26. Hen. 8. c. 1. for forfeitures of estates-tail, and since fines are become so usual; and though VAUGHAN, in the case of *Gardner v. Sheldner* (b), contradicts this opinion of my LORD COKE, and is angry because he cites no authority for it, yet he himself shews no authority to the contrary; and it is no wonder COKE shews no authority, for it were to prove a thing could not be that never was done. In 19. Hen. 8. 8. b. *Dyer*, 33. it is held that it cannot be, even in a will. And the first of these devises that we find is in the case of *Wellock v. Hammond*, cited in *Boraston's Case* (c), and was first countenanced in favour of provision for younger children, and of land devisable by custom. Vide *Cro. Eliz.* 532. 525. 360. 497. 2. And. 22. *Moor*, 422. 464. In the case of *Pell v. Brown*, DODDERIDGE opposed the opinion of the other three Judges, as to the point of its not being barred by recovery; and the opinion in 1. *Roll. Rep.* 835, 836. and *Style*, 274. went down with the Judges like chopped hay; but since it has been so often passed over it must not be questioned now, because the estates of many depend upon it: but this is not like our case. THE SECOND sort is when the devisor does not part with the whole out of himself, but gives future estates to rise upon contingencies, and leaves the inheritance to descend in the meantime; and this is not disagreeable to the common law; as in the case of a devise, that the executor shall sell land, where the lands descend in the mean time; and when the executor doth sell it, the vendee is in from the first testator, and in pleading must claim under him; and by the selling, the freehold and inheritance is, by act in law, devested out of the heir or lord by escheat, even out of the king, if he were lord by escheat, without petition, or *monstrans de droit*. 29. *Edw.* 3. 16. There were no other cases of this nature until of late. The first was *Hynd v. Lyons* (d); the next was the case in *Cro. Eliz.* 838, 819. 2. *Roll. Ab.* 793. and *Bate's Case* (e); and in the case of *Weldon v. Elpington* (f), they take a difference between an inheritance and a term; but it was at last * resolved in *Manning's Case* (g), that there is no difference; which point prevailed against the opinion of a great lawyer, and

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One fee cannot
depend on an-
other by act of
the party, but
may by act of
law.

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- (a) Co. Lit. 18. reported in *Cro. Eliz.* 204. and 2. Leon. 114.
(b) 1. Eq. Abr. 197. *Vaugh.* 259. (d) 2. Leon. 11. 3. Leon. 64. 70.
2. Keb. 781. 1. *Freem.* 11. (e) *Raym.* 82.
(c) *Boraston's Case* is in 3. Co. 19. (f) *Plowden*,
and abridged in 1. Eq. Abr. 190. c. 16. (g) 8. Co. 94. Co. Ent. 149.
and the case of *Wellock v. Hammond*

STATES GOOD rules of common law. Now Judges ought to take great care ^{against} that they do not come to be made perpetuities; for they cannot **ENCL.** be barred by a common recovery, &c. because they have no dependancy on the particular estate; as is adjudged in the case of *Pell v. Brown* (a); and therefore to extend them beyond a common possibility will be dangerous: and there be two sorts of perpetuities, an absolute one, and a qualified one; and estates-tail, from the time of the statute *De Donis* until common recoveries were found out, were looked upon as perpetuities. And suppose this devise to the first issue of *George Jakes* be good, it is to him and heirs; and if that failed, another contingent limited over which could not be barred: and by my consent these sort of limitations shall never be carried beyond a life; nor do I find any authorities to the contrary, but that of *Vaughan* before cited, for which he quotes no authority; and as for 1. *Leo*. 438. I do doubt it is not law. Whether the devise to the first issue of *George Jakes* be good, two things occur to be considered: FIRST, Whether the devise to the first issue of one who has no issue at that time be good? SECONDLY, Whether a lease for eleven years, precedent to such a devise, be good reason of a diversity between the cases? AND I HOLD, that if there were no precedent lease, a devise to the first issue of one, who, at that time, had none, would be void (b), and I find no authority to the contrary. The case most like it seems to be a devise to *Fitz in ventre sa mere*; for he was not *in esse* at the time of the devise; and yet that case is not to be compared to ours, admitting it to be law, which has been never yet settled; but there have been varieties of opinions on it (c). The first I find is 11. *Hen. 6. pl. 15.* and there BABINGTON thought it good, and PASTON *contra*. It is in *Brook tit. "Devise"* 609. with a *quære*; in 7. *Co. 9.* without any decisive opinion; and in 1. *Rel. Ab.* 609, 610. with a *Dubit*. In *Dyer*, 303, 304. Devise to an infant *in ventre sa mere*, if it be a son, void; but I hold that not to be law, because it is executory and contingent; but *à fortiori* it would be void by way of present interest. It is again mentioned in *Dyer*, 342. but no opinion; in *Moer*, 127. and no opinion; and in 177. adjudged good; but in 664. held void: in *Cro. Eliz.* 435. if there be a new publication of a will, after son born, good; *secus* not; in 2. *Bull.* 272. not good; in 1. *Rel. Rep.* 110. void; and in *Lit. Rep.* 255. void: And thus it remained until *King Charles the Second's* time. In the case of *Snow v. Cutler* (d) the Court was divided; * but in the case of *Nurse v. Yarworth* (e) Chancellor FINCH held it good; and my LORD BRIDGEMAN

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(a) 1. *Eq. Abr.* 187. *Cro. Jac.* 590. *Bridge.* 1. *Palm.* 131. 2. *Roll. Rep.* 196. 296. *Godh.* 232.

(b) See *Cases T. T.* 145. 150. 1. *Will.* 203. 4. *Burr.* 2157. 3. *Term Rep.* 86.

(c) See *Proogan*, 244. 293. and *Fearn's Contingent Remainder*, 429.

(d) 1. *Eq. Abr.* 188. c. 10. 1. *Lev.* 135. 1. *Sid.* 153. *Raym.* 162. 1. *Keb.* 567. 752. 800. 851. 2. *Keb.* 21. 243. 296.

(e) 2. *Mod.* 9. S. C. *Finch's Chancery Reports*, 153.

held

held the same, with great respect to former opinions; and I hold it to be good; because the rule is, that when, by the words of the devisor, it apparently is designed for a future interest or devise, it is good; and when the devise is "to *Fitz in ventre sa mere*," without more saying, it is plain he means a future devise, because by the very words he takes notice of his not being *in esse*; and that is tantamount, as if he had devised to another for a time, or let it descend to the heir for a time. But in a devise "to the first son of *J. S.*" who has no son at that time, none can tell by the words of the devisor whether he meant it should take presently or futurely; and therefore it is no more than a present devise to a person not *in esse* (a). It is objected, that this is not like a devise at common law, and the estate may descend in the mean time. But I answer, *Non liquet* by the words of the devise, that the devisor intended it should descend or not; and if it should be good "to the first son of *J. S.*" the next thing would be to make a devise "to the right heirs of *J. S.*" good; nor is the one more remote than the other, for by the death of *J. S.* he shall have an heir, if ever, and it may be he may not have a son until after his death: but in all these cases it would be good by way of a future devise; as that "in case *J. S.* shall have a son, that he shall have it;" that would I say be good, if he has a son in his life-time, but not to a posthumous son (b). — But what seems most difficult in this case is, whether, there being a term of eleven years to expire, it did not come to the issue of *George Jakes* by way of remainder, after the end of eleven years; and whether in that case it shall not be intended an *executory devise*; for a remainder "to *Fitz in ventre sa mere*," upon a term of years, was always held to be an *executory devise*, and good, even by those who did oppose a devise "to *Fitz in ventre sa mere's*" being good (c). I for a long time have been of opinion, that this being after the term for eleven years would be a good *executory devise* to the issue of *George Jakes*; but upon great consideration, I hold it naught now; nor do I go upon the words of the statute of Wills, in which there are no such words as "person or persons," as in the statute of Uses; and as my LORD FINCH, led by the vulgar error, seemed to ground his opinion, if rightly reported in the case of *Snow v. Cutler* (d). It is true, a use limited "to *Fitz in ventre sa mere*" is void, because no *person* according to the statute of Uses; but the statute of Wills makes no mention of *person*, and that makes the difference (e). * The authorities against me are, the case of

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EAGE.

Vide ante p. 39.
in *Simile*. 52.

Ante p. 39. 52.
53. acc.

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(a) See *Taylor v. Biddle*, 2. Mod. 289. *Stephens v. Stephens*, Cases T. T. 222. *Goodwright v. Wright*, 1. Stra. 21. *Andrews v. Fulhome*, 2. Stra. 1092. *Frogmorton v. Holliday*, 3. Burr. 1624. *Fearne on U. R.* 426.

(b) See 10. & 11. Will. 3. c. 16.

(c) See *Freem.* 244. 293. *Fearne C. R.* 439.

(d) 3. Eq. Abr. 188. 1. Lev. 135.

1. Sid. 153. *Raym.* 162. 1. Keb. 567. 752. 800. 851. 2. Keb. 11. 145. 296.

(e) An infant *in ventre sa mere* is now considered, generally speaking, as born for all purposes for his own benefit, *Lancashire v. Lancashire*, 5. Term Rep. 49. Doe on Demise of *Clarke v. Clarke* and Others, 2. H. Bl. Rep. 399. and the cases there cited.

SCATTERED *Nurse v. Yarworth (a)*, which was a devise of a term for years, remainder to the heirs of the body of the devisee; and this was held good by *Chancellor NOTTINGHAM*, because of the term for years. In 2. *Mod. Rep.* 292. a devise for twenty-one years, remainder to the right heirs of *J. S.* was held good for the same reason. In the eighteenth year of *Queen Elizabeth*, in *Justice Rhodes'* written Reports, a devise for years with remainder to the right heirs of *J. S.* was held good, if *J. S.* died during the years; and the case of *Cotton v. Heath (b)* was held good, in respect of a precedent term.—But the words of the will in our case are considerable. “I give and bequeath the manor of ——— to *Ser-jeant ———*, in trust for eleven years;” and then follow these words; “ITEM, I give and bequeath my said manor to the first issue of *George Jakes*,” by which words it seems plainly he meant to pass the freehold and inheritance immediately to the issue of *George Jakes*, and not that it should not go to him till after the eleven years, and so descend to the heir at law in the mean time; for the words are *in presenti*, and look like an immediate devise of the freehold. And to the opinion of *FINCH* in chancery I oppose the opinion of the court of king's bench lately in the case of *Goodright v. Cornish (c)*; and the case of *Cotton v. Heath* is an abridgment; and judged otherwise in *Sir H. Gore's Case (d)*, since *Hilary Term*, in the thirty third and thirty-fourth year of *Charles the Second*; it was an immediate remainder by devise to heir male of body, and held void. And if a lease were devised “to *A.* for life, remainder to the first issue male of *J. S.*” who then has none, the remainder would be void; for to make *Manning's Case (e)* law, they were forced to make the second devise first, and thereupon it was a present devise to a person *in esse*, and so good; which would be otherwise if a devisee of a remainder were not *in esse*; and the second, *Chief Justice HALE* and *BRIDGMAN* held, that a devise of a term's trust by present words to one not *in esse* would not be good; and the case of *Cotton v. Heath* was in chancery; and what a *CHANCELLOR* decrees in case of a trust of a term is no rule for us to walk by; and the case of *Snow v. Cutler* was a devise “to wife for life, remainder to the heirs of *J. S.*” and all the Court held, that it would be void, as to remainder, if there had been no estate for life; but whether that would alter it, they were divided. Our case cannot be thought a future devise, because the words are *de presenti*, “I give and bequeath;” and though it appear by the will the possession was future, yet the freehold is present. See *Wild's Case (f)*, devise “to a man and his children,” if there be no children in being they cannot take as soon as they are born; because the words are present, and they not *in esse*. And they cannot take by way of remainder, because the

Devise to the first issue of *A.* (being after a precedent term) not good by way of executory devise.

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(a) 2. *Mod.* 8. *Finch Chan. Rep.* 155. (d) 2. *Vent.* 90.
(b) 1. *Eq. Abr.* 191. 3. *Chap.* (e) 8. *Co.* 94.
Cases, 29. *Pollert.* 26. (f) 6. *Co.* 16. *S. G. Moor*, 397.
(c) *Ante*, 55. 4. *Mod.* 255. *Salk.* *S. C.* 1. *Eq. Abr.* 181,
226. *Holt*, 227. *Comb.* 254. *Skin.*
408. 1. *Ld. Ray*, 3.

words are present. The case of *Skelton v. Wright* (a), devise SCATTERGOOD
 "to one *et liberis procreat. et procreand.*" was adjudged a future against
 devise; because that appeared to be the intention of the feoffor, EDGE.
 by the word "*procreandis.*" If the devise, in our case, were "to
 "Serjeant ——— for eleven years, the remainder to the first issue
 "of *George Jakes*," I would perhaps construe it as an executory
 devise; and make it good, if *George Jakes* should have issue during
 the eleven years, otherwise not; and that is according to the case
 of *Bates v. Amerst* (b); for as a marriage of one of the daughters
 with a *Norton* would not be good after the fifteen years, so here, Ray. 115.
 an issue born after the eleven years should not take; and if the
 devise had been "to the first issue to be begotten of *George Jakes*,"
 then I would give it to any issue born during the life of *George*
Jakes, but would not extend it to a posthumous son. But it is
 objected from the bar by Serjeant LUTWICH, that though this devise
 were void as "to the issue of *George Jakes*," yet it could not be
 good "to the son of *George Convey*," because it depended on a
 precedent condition, viz. "if issue of *George Jakes* should refuse
 "to assume the name of *Edge*, or die without issue;" which are
 impossible, *George Jakes* dying without issue; vide *Plowd.* 272.
 2. *Inst.* 218. though the condition there became impossible by act
 of the party himself; and this notion was agreed to by the whole
 Court. But here it was adjudged not to be a precedent condition, Devise to one for
 but part of a limitation of a devise of a particular estate, which is life, who is in-
 void; but if it were collateral by itself, it would be a precedent capable of tak-
 condition. *Vide* 9. *Hen. 6. pl. 34. 39. f. 16.* where on a devise to a ing, remainder
 monk, with remainder over, he in remainder shall take immedi- over, he in re-
 ately, because a devise "to a monk" is void; but if it were, that mainder takes
 after the death of the monk it should remain, it should not take immediately.
 till after the death of the monk; vide *Lord Paget's Case.* In
 7. *Edw. 3. 19. A.* seised in fee made a gift in tail, and if the donee
 died without issue, it should revert to the donor for life, remainder
 over in fee; and it was adjudged, that the reversion to himself for
 life was void, and by consequence it should remain over imme-
 diately; and in our case, the devise being void, whatever depends
 on it will be void. And upon the whole matter, this is but a
 * devise for eleven years, remainder to the issue of *George Convey*
 then in being. * [286]

NEVILLE, *Justice*, argued briefly, and agreeing with POWELL,
Justice, in the main touched upon the two great rules in construc-
 tion of wills: FIRST, To maintain the intent of the devisor,
 where it plainly appeared in the will, and consisted with the rules
 of law. SECONDLY, That if it be a present devise, there be one in
 being capable of taking at the death of the devisor; and that this
 was plainly a present devise to the issue of *George Jakes*, and there-
 fore void, there being none *in esse*; and then the second clause "to
 "the issue of *George Convey*" is good, according to 11. *Hen. 6. 7. a*

(a)

(b) 1. *Eq. Abr.* 212. *Raym.* 83.

SCATTERGOOD devise to a monk, remainder over, he in remainder shall take presently, though there is a possibility the monk should be deraigned, *Fuller v. Fuller* (a), and *Taylor v. Bidolph* (b), a devise to sister and heirs, until son should come to twenty-one years; and then to son and his heirs, it was resolved that the fee was immediately in the son. And as to "proviso," it is sometimes a condition, sometimes a limitation, and sometimes a covenant. 1. *Inst.* 203. 1. *Cro* 209. It is here a limitation. And he concluded for the defendant.

against
Engl.

TREBY, *Chief Justice*. These and such like estates are against the antient common law; and therefore it may be said of them as my LORD COKE said of the statute *De Donis*, that since they have crept into the law, they have occasioned great confusion and disorder. And he said, that here the issue of *George Jakes* could not take presently, because not in being; nor futuramente by way of executory devise, because the devise is *in verbis de presenti*; and therefore he could not take at all, and then the second devise is good: And he laid no stress upon the lease of eleven years; for he said a son might be born within them, and he might not; but he said, that if the devise had been, that two years after the eleven years the issue of *George Jakes* should take, it would be a plain executory devise; for the words then would plainly shew it designed futuramente. But where, by the words of the will, it appears a present devise was intended, it ought not to be rather construed an executory one, than the will should be frustrated; and for that devise to right heirs of J. S. who is in full life, shall not be made good. Antient Books generally ran, that a devise "to Fitz. *in ventre sa mere*" is void; but I think we must allow such a devise to be good now (c); for otherwise many wills would be destroyed, which would be inconvenient; and surely there is no difference between saying, "I give my land to the child my wife goes with," and "to the child my wife shall have." * As to executory devises, they were utterly unknown to the common law; have obtained with much ado; and now that they have prevailed, ought to be looked upon with much jealousy, lest they run to a perpetuity: and a perpetuity is such a condition of a fee, that the feoffee shall not be able to give absolutely to another. It was a great policy of the common law, that alienations should be encouraged; for it is the greatest preserver and promoter of industry, trade, arms, and study; and this was visible from the making of the statute *De Donis*, until common recoveries were found out; and these executory devises had not been long countenanced when the Judges repented them; and if it were to be done again, it would never prevail; and therefore there are bounds set to them, viz. a life or lives in being; and further they shall never go, by my consent, at law, let chancery do as they please. In

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(a) 1. E. Abr. 215. 407. Cro. Eliz. 422. Moor, 353. Godolphin, 57.

(b) 2. Mod. 289. 1. Eq. Abr. 188. 2. Eq. Abr. 235. 1. Freeman, 243.

(c) See *Goodright v. Wright*, 1. Stra. 5. *Chapman v. Brisset*, Cases T. T. 145. 150. *Doe v. Carleton*, 1. Will. 225. *Harris v. Barnes*, 4. Burr. 2157. Pop.

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Pop. 6. the Court would not prescribe them any set number of years, but that they should not exceed a life or lives in being (a). But I will not say but an executory devise may well be "to the right heirs of J. S." In *Cro. Jac.* 459. *Pal.* 315. 1. *Jones*, 15. a limitation of a lease "to A. for life, and if she die without issue living at the time of her death, then to B." adjudged void. And *CROKE* says *Manning's Case* (b) would not hold now. 1. *Rel. Ab.* 612, 613. 1. *Sid.* 37. If *Manning's Case* were to be judged now, it would be hard to maintain it. *Ray.* 493. Setting bounds to them now is like a correction of the Judges that gave them countenance first. And so says *HALES*, 3. *Keib.* 178. 123. A contingency ought not to exceed one or two lives, for that is a reasonable extent; but here it is to a son which perhaps would not be born in forty or one hundred years. In *Carter*, 87. 98. a devise "to an infant in ventre sa mere" is good, but void to a son; and that, as far as the Book is an authority, is in point. In *Noy*, 43. a devise to A. for life, remainder to first son; devisee dies leaving wife *enfeint*; the inheritance descends, and vests in the heir of the devisor; and devesting of estates is not favoured in law: And in executory devises the contingency must happen during particular estate, or never. The case of *Coston v. Heath* (c) was a trust in chancery, where they carry those things farther than at law:—HE HELD the proviso to be a limitation and no condition, and therefore the first devise being void, the second shall stand (d); as if a grant be to two, one whereof is capable, and the other not, he that is capable shall take all: So where they are to take at divers times; as a grant to a father, and son not in being, the father shall take all. 1. *Co.* 100, 101. Estate for life devised * to one incapable, remainder over is good. 1. *Les.* 195. *vel* 125. * [288] A lease for life to a person not in being, and a lease to another to commence from determination of the first term, commences presently. *Holcroft's Case* (e) is in point.

Judgment was given for the defendant (f).

(a) See *Fortef. Rep.* 232. 2. *Bl. Com.* 173, 174. 2. *Brown Cases Chan.* 30.

(b) 3. *Co.* 94.

(c) 1. *Eq. Abr.* 191. 3. *Chan Cases*, 99. *Pollexf.* 26.

(d) See *Napier v. Saunders*, *Hutt.* 119. *Avelyn v. Ward*, 1. *Vezey*, 420. *Leithcullier v. Tracy*, 3. *Atk.* 774. *Stat. Hag.* v. *Bell*, *Cowp.* 40. *Bradford v.*

Foley, *Dougl.* 63. *Horton v. Whisker*, 1. *Term Rep.* 346. *Doe v. Brabant*, 3. *Brown Chan. Rep.* 293. 4. *Term Rep.* 706.

(e) *Moor*, 486. 320. *S. C.* 4. *Co.* 30.

(f) See *Fonnereau v. Fonnereau*, *Dougl.* 504. and *Doe v. Brabant*, 3. *Brown Chan. Cases*, 393. *Andrews v. Fulham*, 2. *Str.* 1092.

E A S T E R T E R M,

The Eleventh of William the Third,

I N

The King's Bench.

Sir John Holt, Knt. Chief Justice.

Sir Thomas Rokeby, Knt.

Sir John Turton, Knt.

Sir Henry Gould, Knt.

} *Justices.*

Sir Thomas Trevor, Knt. Attorney General,

John Hawles, Esq. Solicitor General.

Cafe 489.

Cage against Acton.

A bond given by a man to a woman, in consideration of their intermarriage, conditioned, that if she survived him he would leave her such a sum of money, is only *suspended*, but not *extinguished*, by the intermarriage; and such

a bond, and no assets *ultra*, may be pleaded in bar to an action against the obligor, as administratrix, for rent arrear on a demise by deed; for they are in equal degree.—S. C. 1. Bac. Abr. 291. S. C. Carth. 511. S. C. Salk. 325. S. C. Lilly Ent. 214. S. C. Holt, 309. S. C. 1. Ld. Ray, 514. S. C. Comy. Rep. 47. Prec. Chanc. 237. 2. Vern. 480. 2. Peetr. Wms. 243. 5. Term Rep. 581.

DEBT against the defendant, as administratrix to her husband, for arrears of rent upon a lease made to him in his life-time.

The defendant pleaded, that before the intermarriage between him and her there was a bond entered into by him to her to pay so much money to her, her executors, administrators, or assigns, upon condition that, in case she should survive him, he would leave her worth so much money; that he had not performed the condition; that she had not assets above two hundred pounds, which was a less sum than that which he had bound himself to pay her; and that she retained that in part. Upon which the plaintiff demurred generally.

The points in this case were two:

FIRST, Whether debt upon a bond is of as high a nature as rent, so that an executor might give it preference of payment?

SECONDLY, Whether the subsequent marriage were a release of the bond?

This

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This case was argued at the Bar twice ; first by BROTHERICK for the plaintiff and CARTHEW for the defendant ; and afterwards by Serjeant LEVINZ for the defendant, and ——— for the plaintiff.

CASE
against
ACTION.

But THE COURT, viz. HOLT, Chief Justice, ROKEBY, TURTON, and GOULD, Justices, agreed clearly, that rent, whether upon a parol or lease by deed, was in equal degree to bond, and that the executor might prefer whom he pleased.

But THE SECOND POINT being more doubtful,

BROTHERICK for the plaintiff said, and laid it down for a rule, that if a personal action or duty be once extinct, it ever is so ; and therefore they cannot be released upon a condition subsequent. 1. Ro. Ab. 412, 413. And though here this duty was not *solvendum* but *in futuro*, and on a contingency, viz. if the wife survived, yet the lien was present ; and if this were a bond by a stranger to the wife, the husband after marriage might have released ; and it were hard then that he should have power to release to another and not to himself ; and the discharge depends upon the duty, and not on the remedy for it ; and the husband has a more absolute power on a duty to his wife than on an action for it ; for if a bond be made to a wife before * marriage, the husband cannot sue for it without the wife, yet he may release it without her : and that every obligation creates a present duty appears by the forms of pleading ; and obligation and condition are not one deed, but the one is in a manner subsequent to the other ; and therefore when you crave *oyer* of the obligation, the condition is not set forth, but you must crave *oyer* thereof separately. 3. Cro. 580. 5. Co. 70. are in point ; for if I covenant to infeoff you before Michaelmas, a release of all actions before Michaelmas discharges not the covenant ; but if I bind myself in a bond for performance thereof, there is an immediate duty releasable immediately ; but if marriage did not release it in our case, the consequence would be absurd that there should be an immediate duty unreleasable during the coverture. 2. Leo. 20. If a writ be sued out before the day of payment, and that day incurs before judgment, the writ is good, because there was a duty at the time of the purchase of the writ ; and he said, Yelv. 156. and Hob. 216. were rather for him than against him, and that Godbolt, 271. Hutt. 17. and Noy, 26. came nearest to the case ; and he quoted 2. Roll. Rep. 134. in point for him.

* [289]

CARTHEW agreed, that regularly there is in every obligation a present duty ; but that, he said, was to be understood when the *solvendum* was to be on a certain fixed time, and not upon a contingency ; for then he would have it a mere possibility, which in its nature is not releasable : and he said, that whether the condition of an obligation be precedent or subsequent, both made but one deed ; as if A. covenant with B. to pay B. ten pounds if B. do such a thing ; and B. brings covenant, and pleads only what is for his purpose, the rest must come of the other side ; and one can

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create over of nothing but what is part of the same deed ; for if there be a defeasance in another deed, you must produce it in court, which proves the condition and obligation to be but one deed ; and where there is a present duty, marriage is a release of it ; otherwise when the duty is to arise upon a contingency, as here ; a promise, if it be put in writing, is a covenant ; indeed a bond does found in duty, and therefore this writing deserves more the name of a covenant than that of bond ; and he seemed to rely much on the case of *Lupart v. Hoblin* (a).

Afterwards, in *Michaelmas Term*, in the eleventh year of *William the Third*, *ROKEBY, Justice*, being dead, THE COURT argued *seriatim* :

GOULD and TURTON, *Justices*, for the defendant, that the marriage did not release the bond :

HOLT, *Chief Justice*, *totis viribus contra*, and that it was clearly a release.

- [290] *GOULD, *Justice*. Marriage clearly is a release of all bonds and specialties, whether contingent or not, which by any possibility may become payable during the marriage, because husband and wife are but one person in law, and so there can be no payment between them ; and also because the suit is once suspended ; and then it shall ever be so. 11. Hen. 7. pl. 15. 10. Hen. 7. 1. Inst. 264. Dy. 141. But the great objection is, How this bond shall subsist, there being now nobody to whom it is due, and every obligation is *debitum in presenti* ; and a husband's owing a thing to his wife is owing a thing to himself, which is absurd. To this I answer, that the law very often makes a fiction for the preservation of a right ; and a suspension of a personal duty is not always an extinguishment. Litt. sect. 646, 647. This is a necessary and prudent provision in case of survivorship ; and it were hard that marriage should destroy that whereof it was the cause. The rule is, that *modus et conventio vincunt legem*. The law, by its own operation, will do no wrong ; and surely it would be a great wrong to defeat the wife of her provision. 1. Inst. 264. 8. Co. 136. If a *feme executrix* take debtor to husband, it is no release of the debt, because it would be a *devastavit* ; and here the law will interpose and take away the inconsistency of the debtor and debtee between husband and wife, by taking it into its own custody : and he quoted the case of *Dorchester v. Web* (b) : A man obligor marries a woman obligee, who are afterwards divorced, the debt revives, and the man shall be sued by the woman again ; and though here there be a *debitum in presenti*, yet it is a qualified *debitum*, and is no more than a provision in case of chattel, which the law would make in case of inheritance. In the case of *Smith v. Stafford* (c), though it was urged to be a present promise and

(a) 2. Sid. 58.

(c) Hobart, 216. S. C. Hutton, 17.

(b) Cro. Car. 372. S. C. 1. Jones, 345. S. C. Hutton, 128. S. C. Goldf. 21.—See also Cro. Jac. 106. 235—See also the Year-Book 27. Hen. 8. f. 7. b.

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lien releasable by the wife, yet judgment was, that such promise was not released by the marriage, against the opinion of *Hobart*; so here the justice of the law will preserve this debt for an honest intent. In *Noy* it is said, it would be otherwise in a bond; *quod fuit concessum*; but that is not said in any of the other Books that report it; and I see no difference. The law will not work a release contrary to the intent of the parties; and in *Litt. Reports* it is said, that marriage is only a suspension.

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TURTON, Justice. This bond was not entered into for any present debt or duty; if it had, it had been extinguished by the marriage; for as bonds given by others to the wife are by marriage given to and releasable by the husband, so * bonds which she has from the husband are vested in him, and so released by act in law. 1. *Inst.* 264. *Dy.* 6, 7. 140. 1. *Ro. Ab.* 184. 8. *Co.* 186. *Mo.* 236. *Cro. Car.* 333, &c. And it is a rule in law, that releases in law are more mildly taken against the releaser than releases in deed. 1. *Inst.* 264, 265. And it is unnatural that marriage should be a release of that which was made by reason of the marriage. If a debtee make a debtor executor, it is a release of the duty; but if a *feme* executrix take her debtor to husband, that is only a suspension of the action, and the duty remains. *Plow.* 184. *Hutt.* 99. 1. *Inst.* 264. 1. *Ro. Ab.* 194. *Hob.* 10. *Mo.* 255. Father and son bound to *A.* jointly and severally, *A.* makes the son's wife executrix, and held that was only a suspension. And he compared a bond to a covenant or promise, for no action can be brought on any of them till broke; and promise is not released by marriage, *ideo nec* bond; and he quoted *Dy.* 51. *Litt. Rep. Clayton's Case.* Objection, That though statute be of a higher nature, it is no *devastavit* to pay the bond before it, because it is not due till broke. *Vide Mo.* 752. 5. *Co.* 28.

*[29 II]

HOLT, Chief Justice, contra. There are two questions in this case:

FIRST, Whether *rent* be of equal degree with a *bond*, or of higher nature than a bond? and, If payment of debt upon a bond may be pleaded in bar of debt for rent? A case out of 2. *Vent.* was quoted at THE BAR to prove rent of a higher nature than a bond; but I hold them to be of equal degree; for if it be a lease by parol, it is in the realty, and that is in equal degree with a bond, and payment of one by executor is a good plea in bar of the other; and the case of *Newport v. Godfrey* (a) does not contradict this: it was debt for rent upon a parol lease; the defendant pleaded such a debt upon obligation, *ultra quod* he had not assets; for being *in equali gradu*, he could not plead the one against the other till judgment or payment of the money; but otherwise if one of them be of a higher nature than the other; and there is no diversity between debt in the realty by specialty and in realty without specialty, as to equality of degrees; so that if there were no more in this case, the plea would be a good plea.

1. Sid. 210.
Ante, 7.

Vide 1. Lev.
281. et quarre
de hoc, v. 3.
Lev. 114^o 115.
acc.

(a) 3. Lev. 267. 4. Mod. 44. 2. Vent. 184.

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Vide Hob. 217.

• [293]

BUT THE OTHER POINT is a great and considerable one, viz. Whether the bond be not extinguished by the marriage, though given in consideration of the marriage? AND I HOLD the bond to be extinguished by the marriage, and that the bond was a present immediate duty from the sealing and delivery of it; and though it is qualified, that is, though no action can be brought upon it till after the death of the husband, * a release of "all actions" or "all debts" will release it (a); and Coke in his Comment says, a release of all actions will discharge it, though no action can be brought upon it at that time, because it was a thing in action, and without all dispute a present debt; and though it be payable upon condition, yet it is a present duty; and it being a subsequent condition, it must have relation to some antecedent, which is the present duty. In 5. Co. 70. diversity between a condition subsequent and a condition precedent; for a release of all demands will not release a debt upon a condition precedent, but will upon a condition subsequent; and to say that it is not a precedent debt is directly against the words of the agreement, for he is to pay so much presently; and then comes the condition, and does not suspend the debt, but only adds a condition with it: and when you come to declare upon this bond, you do it plainly, without any mention of the condition; but if the condition were precedent, you must set it out in pleading, because you must shew it performed, without which you have not a title; and though they demand *oyer* of the condition, and have it entered of record, by which it is part of the record, yet that does not alter the plaintiff's declaration; for if the defendant do not shew the condition performed, or not broke, or plead a sufficient plea, the plaintiff shall have judgment without taking any notice of the condition. So upon *oyer* of it, if it do not appear to the Court whether the condition be broke or not, the plaintiff shall have judgment; but if it do appear to the Court that the condition is broke, or not broke, they shall give judgment as the condition shall direct; that is, if it be for the doing of a thing which is not done, and that appears to the Court, the plaintiff shall have judgment; or if it be for not doing a thing which is not done, the defendant shall have judgment. So it is plain here is a present duty. Vide 11. Hen. 4. 43. If an obligor pay a debt in a bond without taking advantage of the condition, it is a good payment: so if it be a debt in the present, he may pay it before the day of payment in the condition; and marriage is an actual payment of the money, for by the marriage the bond is given to the husband, and then he himself is to pay it, and is the person to whom it is to be paid, and none can pay or do other act to himself; and if a stranger had made a bond to the *feme* that the husband would leave her worth so much money, the husband might release it. Co. 264. Plow. 185, 186. and *Arundel's Case*; and the Books make no distinction, *et ubi lex non * distinguit nec nos distinguere debemus*: and I see no grounds of distinction, besides my not finding it in any Books: and suppose there had been a defeasance of this bond,

(a) See Litt. sect. 512.

and

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and after an intermarriage, surely that would discharge the bond ; and though a condition be on record, that will make no difference, for the defendant must plead performance of it. The case where the executor of the obligee marries the obligor is different, for there are divers rights ; but where the obligee marries the obligor, there he is to receive money to his own use. If a man possessed of a term in right of his wife purchase the inheritance, it is not an extinguishment, because of divers rights ; and the diversity of right is a good ground for diversity in law. 1. *Inst.* 264. 8. *Co.* 136. Another reason is, that such release would work a wrong in prejudice to a third person. Tenant for life grants a rent, and then surrenders ; yet rent shall continue during his life. A man having rent in fee confesses a statute, and then releases the rent, yet it shall have existence as to the conusee : And upon the same reason is the case of the marriage of the executor of the obligee to the obligor : and if the obligor pay money to the *feme* executrix of the obligee, and after marry her, the law does not make a gift of it to the husband, but he shall have it liable to all the debts and legacies of the testator. Now a bond is not supported by any thing but itself ; and here it is not the marriage that is the consideration of it, for it needs none, being sufficient of itself ; but in case of a promise the marriage is the consideration, and the consideration is what supports the promise. I grant the law will work no wrong to a third person ; but here the marriage is the act of her that is prejudiced by it, and therefore it cannot be thought a wrong to her. In the case of divorce put, there it was no marriage at all *ab initio* ; and if husband and wife made a feoffment of lands of the wife, and were afterwards divorced, it was a discontinuance ; for between themselves relation made a nullity, but never as to a third person. *Hob.* 10. A personal action once suspended is ever gone. And though the condition be contingent, yet the obligation is absolute ; and the marriage is a release of the obligation, and not of the condition ; and a release of a condition is not a release of the obligation. Now as to the authorities quoted by my Brothers, a man promises to leave his wife worth one thousand pounds in case she survived him, a subsequent marriage does not discharge that promise ; and the law is so, though against the opinion of * *Hobart* ; but in the case of a promise, there is nothing due to the wife till after the death of the husband, and may be there never will be anything due to her. And pleading doth not make law, but on the contrary pleading must be conformable to law, and is good evidence of the law ; and in case of a bond a duty arises immediately, and is only defeasible upon a condition subsequent ; but upon the promise it does not arise until after the death of the husband. I do agree, there is no difference in this respect between a promise and a specialty, if they be made in the same manner ; for if there be a covenant to leave a wife worth so much money if she survive him, that shall not be discharged by marriage ; and a release of all demands is not a release of a covenant until it be broke, because until then it does not lie in demand. If a promise had been
by

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by a stranger to a wife, that the husband, in case she survived him, would leave her so much; or if a stranger had covenanted so, after marriage, the husband could not release such promise or covenant; for the rule is, anything that may accrue to the wife during marriage the husband may release; and such release will be good, though the thing do not fall during the marriage (a). As if a devise be of a lease to *feme*, after the death of *J. S.*; though the husband has nothing in the lease till after the death of *J. S.* yet he may release it, because it may fall in possession during the marriage. The case of *Belchier v. Hodgson*, in *Yelverton* (b), is not very good sense, and is much better in *Cro. Jac.* 222.; and the reason of a resolution is more to be considered than the resolution itself: and though the intent of the parties were, that the marriage should not release this obligation, yet that shall never alter the rule of law; nor is it fit the law should be strained or trodden down to support the intent of *lay gens*, when they take a wrong way of agreement inconsistent with it. And he said, that even chancery would not give relief in this case, though it may be thought much more proper for equity than law: and he quoted the case of *Darcy v. Chute* (c): A woman had seven hundred pounds a-year, and by writing with an intended husband it was agreed between them, that she should take the profits of it until her death, and, after marriage, the husband took all the profit, contrary to the agreement; and upon this a bill was brought in chancery, but they would not relieve contrary to the rule

**Vide Cases in
Chanc. 1st Part,
118.**

* [295] of * law.

This case went afterwards into chancery, where relief (d) was given, the bond being considered as a marriage-agreement (e).

(a) See the case of *Clark v. Thompson*, Executor of *Isaac*, *Cro. Jac.* 571.

(b) *Yelv.* 156.

(c) 1. *Chan. Cases*, 21. 1. *Eq. Abr.* 63.

(d) Judgment was given for the defendant, and afterwards a writ of error was brought, *S. C.* 1. *Ld. Ray.* 523. But the plaintiff in error, perceiving the Court above inclined to affirm the judgment, did not proceed, *S. C.* *Carth.* 513. *See quare*, If it was not affirmed? 5 *Term Rep.* 387. The arguments of *Gould* and *Turton*, *Justices*, in this case have been approved of and confirmed by a recent determination in the court of king's bench, in which it was decided, "that a

"bond conditioned for the payment of
"money after the obligor's death,
"made to a woman in contemplation of
"the obligor's marrying her, and in-
"tended for her benefit if she should
"survive, is act released by the mar-
"riage." *Michaelmas Term*, 34. *Gr.* 3.
5. *Term Rep.* 381 to 387.

(e) See the case of *Cotton v. Cotton*, *Prec. Chan.* 41. *S. C.* 2. *Vern.* 290. *S. C.* 2. *Chan. Rep.* 138. *Action v. Acton*, *Prec. Chan.* 237. *S. C.* 2. *Vern.* 480. *Carrel v. Baskle*, 2. *Peer. Wma.* 243. *Watkins v. Watkins*, 2. *Atk.* 97. *Tyrill v. Hope*, 2. *Atk.* 561. *Beard v. Beard*, 3. *Atk.* 72.

Case 496.

Carrill against Cockran.

The defendant ordered to put in special bail on a special *assumpsit* for money won at play.

S. C. *Holt*, 85.

THE QUESTION, upon motion, was, Whether they would hold the defendant to special bail, in a special *assumpsit*, for money won at play?

TURTON and **GOULD**, *Justices*, seemed to incline they should not give him better security than he was willing to take at first.

But **HOLT**, *Chief Justice*, said, they never ought to enter into the merits of a cause upon a question about bail; for to order com-

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mon bail upon merits would slur a man's cause of action ; and no man ought to have his cause tried with disparagement upon it ; and though this may be for money won at play, yet it was a lawful contract which the act of parliament allowed of ; and no man ought to be wiser than the law ; and this was giving money against money, for which *indebitatus assumpsit* would not lie (a), but an action upon *the special contract* ; and to say, that because he depended upon the defendant's word at first, he, therefore, should have no special bail, would be a reason why there should be no special bail in any simple contract.

CARRILL
against
COCKMAN.

And here *special bail* was ordered ; and it was said to be so ordered in like cases in the common pleas.

(a) See Walker v. Walker, ante, 238.

MICHAELMAS TERM,

The Eleventh of William the Third,

IN

The King's Bench.

Sir John Holt, Knt. Chief Justice.

Sir Thomas Rokeby, Knt.

Sir John Turton, Knt.

Sir Henry Gould, Knt.

} *Justices.*

Sir Thomas Trevor, Knt. Attorney General.

John Hawles, Esq. Solicitor General.

Cafe 491.

Memorandum.

* [296]

SIR THOMAS ROKEBY, *Knight*, died on the twenty-sixth of *November* in this Term after a long illness.

Cafe 492.

* *Fisher against Wiggs.*

If a copyholder
seised of custom-
ary lands in fee
at the will of the
lord surrender
them "to the
" use of his
" wife for life,
" and after her
" decease to the
" use of A. B.
" C. D. and E. his children, equally to be divided among them and their respective heirs and assigns
" for ever," the children take a *tenancy in common*, for the words would be so construed in a *will*, and
a surrender shall have the same construction as a *will* (a); but such words in a *deed* would make a
jointenancy.—S. C. Comy. Rep. 88. S. C. i. Ld. Ray. 622. S. C. i. Salk. 351. S. C. 3. Salk.
206. S. C. Holt, 259. S. C. Lill. Ent. 205. S. C. i. Peet. Wms. 14. S. C. 2. Eq. Abr. 535.
Litt. Rep. 346. 2. Vezey, 252. 3. Atk. 731. 1. Willc. 341. Sayer, 67. 71. Cowp. 660. Co.
Litt. 190. 2. Bl. Com. 194.

A SEISED of a copyhold estate in fee surrendered it "to the use of the wife for her life, the remainder to his five children, equally to be divided between them and their respective heirs for ever."

THE QUESTION was, Whether this was a *jointenancy* or a *tenancy in common*?

CARTHEW would have it a *tenancy in common*; for it being a surrender to use, it would receive the same construction with a

(a) See the case of *Idle v. Cook*, 2. Salk. 620.

use

Michaelmas Term, 11. Will. 3. In B. R.

use at common law, which is not to be compared to a grant by deed, but more to a will; in which clearly this would be a tenancy in common; and the reason is, because the intent is apparently so; and the law will construe wills according to the intent, if consistent with the rules of law; and it ought to be so in like manner in the case of uses, which were dirigible and governed by equity, and now executed by the statute, as chancery would have done before; and surely a court of equity would consider a use at common law, if declared in this manner, to be in common, and not joint; and for supporting the intent of the parties he quoted *Lit. sect. 296. 298. Dy. 361. 2. Leo. 72. 3. Co. 37. Litt. Rep. 46, 47. Cro. Car. 75. 1. Leo. 257. Cro. Eliz. 695, 696.*

*Finnar
against
Wicks:*

NORTHEY, since Attorney-General, *contra*. The surrender of a copyhold estate is a perfect grant, and to be pleaded as such, and therefore to be construed like other grants (*a*). There is no difference between "surrender" and "grant (*b*)."
Surrender and grant are the same (*c*). So the words "equally to be divided" here * shall be void; and the law favours jointtenancy more than * tenancy in common; the one preserving the estate entire, a thing the law delights in, and the other dismembering it, which the law abhors; and for this reason it is that the eldest son runs away with all. And where a thing is given by joint words, it shall not be made common, without express words that make an absolute division; but an intent that they shall be divided will not do. A man granted three acres of land to three (*d*), which is a joint estate; and after, in the same deed, covenants with them *et quolibet eorum*, which should seem to shew his intent to have been that they should have several estates, in respect whereof he made a several covenant; yet that notion was rejected. And the diversity is manifest between a deed and a will; for in a will the testator, who is supposed to be destitute of counsel, has his manifest intent supported by construction, if by advice of counsel he could have legally done it; but there is no reason for such favour in the case of a deed, where the parties might have taken advice. If lands be given to two, *habendum* one moiety to the one and the other moiety to the other, there the *habendum* makes an actual division; and nothing divides jointtenancy in a grant but what does it actually by the very words thereof. "Equally to be divided," in a will, was holden to be no tenancy in common (*e*); which case, though in truth not law, yet it shews how tender the Judges were of severing a jointure. *Style, 211*. "Equally to be divided" makes a tenancy in common in a will, but not in a grant. 2. *Roll. Abr. 90.* and the case of *Ward v. Everard (f)*.

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(*a*) 1. Cro. 366. Jones, 340.

(*b*) Popham, 39.

(*c*) 2. Bulst. 272. Cro. Jsc. 376. Cro. Eliz. 29.

(*d*) 5. Cp. 19.

(*e*) 3. Cro. 33d.

(*f*) Ante, 227. Comb. 329. Carth. 340. Salk. 390. 5. Mod. 25. Holt, 368. 1. Ld. Ray. 422.

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Surrender of a copyhold is a grant, and to be so pleaded. **HOLT, Chief Justice.** There is no difference in a grant between giving lands "to five and their heirs" and "to five and their heirs respectively," or "to five and their respective heirs." And without doubt a surrender of a copyhold is a grant, and to be pleaded as such.

This was again argued.

And to have it a *tenancy in common*, the rule in *Hob. 277.* that Judges ought to be curious and *assute* to find a means to support the intent of parties; which often makes Judges, in constructions, transpose clauses in deeds, and split an instant into priority and posteriority, and never adjudge without reluctance against the intent of parties, especially in intended provisions for children; and "equally divided" and "to be divided" are the same; and here it cannot be equally divided to them and their heirs, if it be made a jointenancy. *Vide Style, 434.* where **POPHAM's** opinion is cited, * [298] that in construction of tenancy * in common the subject matter is to be considered; and though strict rules of law ought not to be receded from in the creating of estates, yet it is not so in qualifying an estate created. *Vide Hob. 172 Litt. 298.* A *scilicet* qualifies an estate of jointenancy into a tenancy in common, and the substance of the premises is not hereby altered; and tenants in common have each of them the land to his use, as well as in case of jointenants; and if a *scilicet* or *viz.* which is called *clausula ancillaris*, make a jointenancy into tenancy in common, *a fortiori* "equally to be divided to them and their respective heirs" will do it; and there is not any set form of words necessary to make a tenancy in common. *Litt. sect. 298.* If the words here were, "each to have a fifth part," it would do; and "equally to be divided" and "each to have a fifth part" is the same in substance, though the words be different. It is true, as is objected, that the first words are joint, but they make a jointenancy only by implication, which is controllable by subsequent express words; as where lands are given generally, that implication of an estate for life may be enlarged into a fee, or abridged into a chattel, by subsequent express words. So if lands be given to two, *habendum* to one for life, the remainder to the other for life. *Dyer, 12. Cro. Eliz. 759. Moor, 667. Owen, 167. J. S.* by deed acknowledged to have received twenty pounds to the use of *A.* and *B.* equally to be divided; *A.* dies, his administrator brings an action for a moiety, and had judgment, because of the words "equally to be divided:" a much stronger case than ours, being of a personal thing, harder to be severed; for if there be two obligees of a bond, and one of them is attainted, the King shall have all; otherwise in case of lands. *Yelv. 23. 1. Brownl. 82.* It was insisted upon, that the strict rule of law is not to be adhered to in the case of a surrender of a copyhold; for there is hardly a more extensive rule, or subject to fewer exceptions, than that a person not named in the premises shall not take *in presenti*; and yet it does not hold in copyholds. *2. Roll. Abr. 67. Fitz. 19. Popb. 125, 126.*

As

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At least copyholds shall have the same favours as uses ; and the words in our case would make a severance of a freehold, in case of use at common law. 2. *Vent.* 363. A covenant to stand seised “ to the use of A. for life, remainder to the use of two persons, “ equally to be divided ;” adjudged the remainder was in common.

FRANK
against
WILKINSON.

* Afterwards in *Hilary Term* THE COURT argued *seriatim*. * [299]

GOULD and TURTON, *Justices*, held it a tenancy in common.

GOULD, *Justice*, first cited the opinion of *Chief Justice* RICHARDSON in *Beck's Case* (a), that in the construction of deeds all the words ought to have their effect, if possible ; and he said, that he knew no authority against making these words to amount to a severance of the jointure ; and therefore to reject them would be inconsistent with the rules of construction. He confessed, that they ought to be strict in creating and limiting estates ; but that is only where there are express words or phrases made necessary by the law to the creating or limiting of estates. But here are no express set words necessary to make a tenancy in common, or a jointenancy, but such only as shew the intent of the party, which of them he designed (b). So I hold, that any words which manifest that the testator, &c. intended that they should have several properties will make a *tenancy in common*, for it is neither a creation nor a limitation of estate, but a qualification of an estate already created and limited ; and therefore a release from one jointenant to another needs no words of inheritance ; and joint premises may be severed by *habendum*, because it only alters the quality of the estate. So that if it be apparent how the donor intended to have the estate he gives qualified, such construction as maintains that qualification ought to be put upon his words. If a man devise his land “ to one “ and his heirs” it is a fee ; but if he add, “ and if he die without “ heir of his body A. shall have remainder,” this makes it an entail. 19. *Hen.* 6. 74. pl. 41. In the case of *Blisset v. Cranwell* (c), A. devise “ to two sons and their heirs, and the longer liver of them, “ equally to be divided among them after the death of his wife,” was adjudged a *tenancy in common*, notwithstanding the express jointenancy : and in a will “ equally to be divided” and “ to be “ divided” are the same thing ; and we are here upon the construction of a use, which is much to be compared to a will. In 2. *Roll. Abr.* 67. a surrender was out of court, and the surrenderee took a new copy to himself alone in the premises, “ *habendum* to “ him and his wife ;” and though the wife, by common law, should not take, being not named in the premises, yet this being of a copyhold estate shall be good to both ; so that a surrender receives a more favourable construction than a common-law grant. I cannot cite a case at large that was solemnly adjudged, in *Easter Term*, in the thirty-second year of *Charles the Second* ; it

(a) *Litt. Rep.* 346.

(b) *Litt. sect.* 292.

(c) 3. *Lev.* 373. 1. *Salk.* 226. *Comb.* 256.

FRANK
against
WILKS.

was indeed a feoffment in fee "to two and their heirs, * equally
"to be divided between them;" but no judgment entered, though
all the Judges, except JONES, *Justice*, inclined to make it a
tenancy in common; and JONES took the difference between a deed
and a will. *Coke Litt. (a)* says, "if a verdict find that one was
"seised of a manor *in tres partes dividend.* it is a *tenancy in common*;
"fecus if it be *divisas.*" *Yelverton (b)* has the same case; and
the same in *Moore (c)* and *Croke (d)*, that if an interest be granted
to three, "equally to be divided," it will be a *tenancy in common*.
A grant to two, *habendum* to one for life, remainder to the other
for life, severs the jointure (*e*): and he said, the authorities against
him were notional diversities between a deed and a will; but surely
this is such a deed as deserves as favourable a construction as a will,
it being a surrender to a use. As to 2. *Roll. Abr.* 90. and *Style*, 211.
where it is said, that "equally to be divided" will not make a
tenancy in common in a deed, as in a will, they are but the same
authority both; and though it were allowed for law, yet it is not like
this, because it was a perfect conveyance at common law, and this
by way of use, where we must have regard to the intent; and the
words "respective heirs" shew plainly that he intended the heirs
of both should take.

TURTON, *Justice*, agreed in omnibus; and added, that surren-
ders of copyhold estates were made in the last extremity, as well
as wills, and therefore more especially ought to have the same
favour; that this is a provision for children; that the intent was
manifest; and for that reason, since no special form of words was
necessary, they ought to make it a *tenancy in common*; if not for
other reasons, yet because it is a use dirigible by equity before the
statute, and now executed by the statute, as the *subpœna* would
have ordered it before.

HOLT, *Chief Justice*, contra. My Brothers go upon two
grounds. THE FIRST is, That in all deeds this would be a *tenancy*
in common. AND, SECONDLY, That if it were not so in a deed,
yet it ought to be so in this case, it being a surrender of a copyhold
estate to a use. The case they most rely upon is the additional report
of *Poph.* 125. and there it is uncertain whether the wife be named.
Certainly nobody knows the author of that report, and it differs
from *Cro. Jac.* 434. And I hold, against that authority, that if a
copyholder surrender to his lord, declaring no use, the copyhold is
in the lord, and he may new grant it to him; and the grantee shall be
in from the lord, and not from the surrenderor; and to say that a sur-
render of a copyhold estate shall be otherwise construed than a deed is
to contradict *Coke's Copyhold Cases*, where it is resolved, * that they
are to be governed according to the rule of the common law, if it be
not where a particular custom prevails; and in some manors there
is a custom, that if a surrender be to three, the first named shall take

(a) Co. Lit. 150. b.

(b) *Whorewood v. Shaw*, *Yelv.* 23, 24.

(c) *Shaw v. Norwood*, *Moor*, 667. n. 914.

(d) *Shaw v. Sherwood*, *Cro. Eliz.* 729.

(e) *Dyer*, 10.

all for his life, and so of the second, &c. And by the customs of some such manors, if the first taker surrenders to the lord, he destroys all the other two estates in remainder. And if these words, "equally to be divided," signify anything, they signify no more than the law would otherwise intend, for everyone will have a fifth part, and no interest in the other parts. 1. Inst. 186. a. One jointenant cannot forfeit more than a moiety, though they have a joint freehold; yet if both of them join in a feoffment, and one of them die, the feoffee must plead a feoffment by them both. And Litt. sect. 262. that jointenants are in by one title, and tenants in common by several titles. 1. Inst. 189. Jointenants hold by one title and one right; as if lands be given to J. S. and Bishop of Norwich, they are tenants in common, because they have it by several rights, though by one title. But tenants in common have divided several freeholds and inheritances, but a joint occupation as well as jointenants; and therefore if one tenant in common take all the profits, the other has no remedy, no more than one jointenant would have in that case against his companion; so "equally to be divided" may go to the possession, which is joint in both cases. As to the addition of the words, "and their heirs respectively," it is no more than what the precedent words imply if they were out: as if lands were given to two and their heirs, it shall go to their heirs respectively, that is, be indifferent to go to the heirs of the one or of the other till survivor, and so *expressio eorum quæ tacite insunt nihil operatur*. In *Dr. Drury's Case* (a), these words "during the term" are rejected, because understood if they were omitted; for the grant would be the same without them; and in our case, it being a jointenancy, it is a consequence that the survivor and heirs shall have it. It is objected, that *Littleton* (b) says that "one moiety to one, and the other moiety to another," makes a tenancy in common, and distributed by one deed. I answer, that though it be indeed one deed, yet they are distinct conveyances; and livery to the one, *secundum formam chartæ*, will not avail the other; and in our case here is no distribution, for "equally to be divided" or "equally divided" is repugnant to a tenancy in common; but "one moiety to the one, and the other moiety to the other" is of a moiety undivided, and therefore a tenancy in common. But if twenty acres be given, *habendum* ten acres to one and ten acres to the other, the *habendum* is void, because the distribution would be repugnant to the nature of a tenancy in common, which must only be of a moiety, &c. undivided: and, if these words could signify anything, the parties could not take until division. *Co. Litt.* 413, 414. Moiety or third part is *pro indiviso*, without distinguishing jointenancy from tenancy in common. *Asto Co. Litt.* 190. where it is said, that if a verdict find one was seized of two parts to be divided: first, It is by way of "it seems," and conjectural; and secondly, It is not at all material to the case of 21. *Edw.* 4. 22. which is only, that a verdict finding one seized of *tres partes divisas* is not to be taken for tenancy in com-

French
against
Wood.

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(a) 8. Co. 139.

(b) Litt. sect. 292.

Easter Term, 11. Will. 3. In B. R.

CASE
against
Action.

- [292] But THE OTHER POINT is a great and considerable one, viz. Whether the bond be not extinguished by the marriage, though given in consideration of the marriage? AND I HOLD the bond to be extinguished by the marriage, and that the bond was a present immediate duty from the sealing and delivery of it; and though it is qualified, that is, though no action can be brought upon it till after the death of the husband, * a release of "all actions" or "all debts" will release it (a); and Coke in his Comment says, a release of all actions will discharge it, though no action can be brought upon it at that time, because it was a thing in action, and without all dispute a present debt; and though it be payable upon condition, yet it is a present duty; and it being a subsequent condition, it must have relation to some antecedent, which is the present duty. In 5. Co. 70. diversity between a condition subsequent and a condition precedent; for a release of all demands will not release a debt upon a condition precedent, but will upon a condition subsequent; and to say that it is not a precedent debt is directly against the words of the agreement, for he is to pay so much presently; and then comes the condition, and does not suspend the debt, but only adds a condition with it: and when you come to declare upon this bond, you do it plainly, without any mention of the condition; but if the condition were precedent, you must set it out in pleading, because you must shew it performed, without which you have not a title; and though they demand *oyer* of the condition, and have it entered of record, by which it is part of the record, yet that does not alter the plaintiff's declaration; for if the defendant do not shew the condition performed, or not broke, or plead a sufficient plea, the plaintiff shall have judgment without taking any notice of the condition. So upon *oyer* of it, if it do not appear to the Court whether the condition be broke or not, the plaintiff shall have judgment; but if it do appear to the Court that the condition is broke, or not broke, they shall give judgment as the condition shall direct; that is, if it be for the doing of a thing which is not done, and that appears to the Court, the plaintiff shall have judgment; or if it be for not doing a thing which is not done, the defendant shall have judgment. So it is plain here is a present duty. Vide 11. Hen. 4. 43. If an obligor pay a debt in a bond without taking advantage of the condition, it is a good payment: so if it be a debt in the present, he may pay it before the day of payment in the condition; and marriage is an actual payment of the money, for by the marriage the bond is given to the husband, and then he himself is to pay it, and is the person to whom it is to be paid, and none can pay or do other act to himself; and if a stranger had made a bond to the *feme* that the husband would leave her worth so much money, the husband might release it. Co. 264. Plow. 185, 186. and *Arundel's Case*; and the Books make no distinction, *et ubi lex non * distinguit nec nos distinguere debemus*: and I see no grounds of distinction, besides my not finding it in any Books: and suppose there had been a defeasance of this bond,
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(a) See Litt. sect. 512.

and

Easter Term, 11. Will. 3. In B. R.

CASE
against
ACTON.

and after an intermarriage, surely that would discharge the bond ; and though a condition be on record, that will make no difference, for the defendant must plead performance of it. The case where the executor of the obligee marries the obligor is different, for there are divers rights ; but where the obligee marries the obligor, there he is to receive money to his own use. If a man possessed of a term in right of his wife purchase the inheritance, it is not an extinguishment, because of divers rights ; and the diversity of right is a good ground for diversity in law. 1. *Inst.* 264. 8. *Co.* 136. Another reason is, that such release would work a wrong in prejudice to a third person. Tenant for life grants a rent, and then surrenders ; yet rent shall continue during his life. A man having rent in fee confesses a statute, and then releases the rent, yet it shall have existence as to the conusee : And upon the same reason is the case of the marriage of the executor of the obligee to the obligor : and if the obligor pay money to the *feme* executrix of the obligee, and after marry her, the law does not make a gift of it to the husband, but he shall have it liable to all the debts and legacies of the testator. Now a bond is not supported by any thing but itself ; and here it is not the marriage that is the consideration of it, for it needs none, being sufficient of itself ; but in case of a promise the marriage is the consideration, and the consideration is what supports the promise. I grant the law will work no wrong to a third person ; but here the marriage is the act of her that is prejudiced by it, and therefore it cannot be thought a wrong to her. In the case of divorce put, there it was no marriage at all *ab initio* ; and if husband and wife made a feoffment of lands of the wife, and were afterwards divorced, it was a discontinuance ; for between themselves relation made a nullity, but never as to a third person. *Hob.* 10. A personal action once suspended is ever gone. And though the condition be contingent, yet the obligation is absolute ; and the marriage is a release of the obligation, and not of the condition ; and a release of a condition is not a release of the obligation. Now as to the authorities quoted by my Brothers, a man promises to leave his wife worth one thousand pounds in case she survived him, a subsequent marriage does not discharge that promise ; and the law is so, though against the opinion of * *Hobart* ; but in the case of a promise, there is nothing due to the wife till after the death of the husband, and may be there never will be anything due to her. And pleading doth not make law, but on the contrary pleading must be conformable to law, and is good evidence of the law ; and in case of a bond a duty arises immediately, and is only defeasible upon a condition subsequent ; but upon the promise it does not arise until after the death of the husband. I do agree, there is no difference in this respect between a promise and a specialty, if they be made in the same manner ; for if there be a covenant to leave a wife worth so much money if she survive him, that shall not be discharged by marriage ; and a release of all demands is not a release of a covenant until it be broke, because until then it does not lie in demand. If a promise had been
by

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Case 494.

The King against Kirk and Cage.

POP HAM CONWAY, ALIAS *Seymour*, having a sudden falling out with *Kirk* in *St. James's Park*, after hot words and some blows there, *Seymour*, *Kirk*, and one *Cage*, *Kirk's* friend, immediately walked out of the Park; and *Seymour*, in his way, took up one *Morley* as his friend with him; and as soon as they got out of the Park they all four fought, where *Seymour* received a wound from *Kirk*, which put him into a fever, whereof he died; whereupon *Kirk* and his friend *Cage* fled.

The coroner's inquest found this murder, and a bill was likewise found by the grand jury; and process thereupon; and *non est inventus* returned. Afterwards in the Vacation, they, having surrendered themselves, gave the prosecutor's clerk in court notice that they would move the first day of next Term to have a trial.

And upon that motion THE COURT *seriatim* delivered their opinions.

GOULD, *Justice*. Here is a murder found by the coroner's inquest, and a trial ought not to be spurred on specially, where there is no affected delay in the prosecutor: and here they fled from justice; but afterwards surrendered, and lately gave notice; and their surrender ought to be reckoned from the notice given, since * when there is not sufficient time for the prosecutor to prepare: therefore no trial.

TURTON, *Justice*. Liberty is one of the darlings of the law, wherefore there ought not to be an affected delay of prosecution; but here it is their own fault that they are not tried sooner, for why did they fly? and I am not satisfied that notice to the clerk in court is good here; but there ought to be immediate notice to the prosecutor, and no difficulty ought to be put upon a prosecution.

HOLT, *Chief Justice*. The trial ought to go on, not out of favour, but of right; for by the law of the land malefactors ought to be brought to punishment in convenient time for public example; and it is five months since the fact was committed, and it was almost in the face of the Court; and surely five months is convenient time: Then as to their flight, that ought not to be made an ingredient, for they incurred the penalty of the law for that already, viz. the forfeiture of goods and chattels in case of acquittal (a). And as to the point of notice, the prosecutor ought to have been in court at the return of *non est inventus*, to take a new process, and so have notice of surrender; and the not doing whereof argues his laches. *Vide* 3. Hen. 7. a statute for speedy trying of murderers, which is not in favour of offenders, but to bring them to justice: And there has been neglect in the prosecutor, even since notice given, for that was on the tenth instant, and this is now the twenty-fourth.

(a) See 4. Hawk. P. C. 7th edit. ch. 49. l. 14.

Then

Michaelmas Term; 11. Will. 3. In B. R.

Then IT WAS MOVED they should be bailed.

BUT HOLT, *Chief Justice*, said, that since the trial is put off for default in them, there is no room for bail without some special cause.

Prisoner not bailable on trial being put off. Post 309.

And he ordered it to be made a rule of Court, that the witnesses be bound over to appear against the prisoners next Term.

On trial put off witnesses bound over.

NOTE, In this case it was granted, that some of the grand jury who found the bill might be of petit jury.

Persons on the grand jury who found the indictment, may be of the petit jury.

And HOLT, *Chief Justice*, said, that the evidence sworn before the coroner could not be offered here, if they might have the witnesses themselves.

Depositions before the coroner cannot be read if the deponents are alive.—Kely. 55. Keyl. 180. Salk. 287. 2. Jones, 53. 1. Hale, 304. 2. Hale, 284. Foster, 337. 2. Stra. 920. Bull. N. P. 239. 4. Hawk. P. C. 7th edit. ch. 46. f. 15.

And by HOLT, *Chief Justice*, Though their going out of the Park was by mutual consent, and though they had done it for more convenience, yet it being upon a sudden falling out, and in pursuance of that heat, it cannot be murder.

Homicide on a sudden falling out cannot be murder.

Nor is it material who drew first, since both had weapons drawn; and if Kirk be guilty, Cage must be so too; and it may be a question whether Morley, though the deceased's second, be not so likewise: and though the wound were not the immediate cause of Seymour's death, it suffices that it be the mediate cause.

2. Jo. 53. Keyl. 55. 1. Sid. 277. Keyl. 56. Crompt. Just. 25. 3. Inst. 51. Keyl. 26.

* Richardson against Seise.

* [306]
Case 495.

A FEME COVERT by the consent of her husband made her will, and appointed another *feme covert* her executrix. Her father, upon oath of her dying a widow, obtained administration; and being cited below by the executrix to have the administration revoked, moved for a prohibition, upon a suggestion that she was *covert* at the time of her death, and had a rule *nisi*.

A *feme covert* may make a will with consent of her husband.

The matter being opened to the Court, they discharged the rule.

HOLT, *Chief Justice*. A married woman cannot make a will, even as executrix, without consent of her husband (a). Roll. Abr. "Executor" 912. If a *feme covert* be executrix and legatee, administration de bonis non ought to be to her husband; if she be not legatee, and others are, it ought to be given to them; if there be no legacies, to the next of kin to the first testator.

NOTE, A papist convict cannot be an executor; *secus* he may;

1. Jo. 249 207. 1. Ven. 217.

per HOLT, *Chief Justice*.

(a) See Dubois v. Triant, post. 436.

Michaelmas Term, 11. Will. 3. In B. R.

Case 496.

Child against Harvey.

Trial set aside.

THE *nisi prius* was, "*die Lunæ in mense Pasch.*" and no such day could be that year, wherefore the trial was set aside. *Vide* 2. Rich. 3. *Cra. Eliz. Webb v. Manby, 9. Edw. 4.*

Case 497.

Turner against Main.

Not saying where the conversion was is cured by verdict. S. C. 5. Mod. 444.

ACTION UPON THE CASE by the assignee of commissioners of bankrupt, setting forth, that the bankrupt had recovered such a sum against the defendant's testator, and that execution remained to be done, and debt was assigned to the plaintiff; and that goods to such a value of the testator came to the defendant's hands, which he converted to his own use. After verdict it was moved in arrest of judgment.

FIRST, That it was not laid wherethe goods came to his hands, or where the conversion was.

Sed non allocatur; because though the execution would have been good on demurrer, yet now it was not material after verdict.

Chancery may refuse to grant a commission without petition; but if it do, it is good.

* [307]

SECOND EXCEPTION, Because it is not said that this commission was obtained upon petition in writing, as the statute directs.

Sed non allocatur; for though chancery may refuse to grant a commission without a petition in writing, yet if they will do it, it shall not vitiate; and this may be a supplemental commission, which requires no petition in writing.

Declaration by assignee without saying the money had been paid to the bankrupt, is good.

THIRD EXCEPTION, That it was not said in the declaration, that the money was not paid to the bankrupt before the act of bankruptcy committed.

But PER CURIAM, Saying that execution remained to be made, supplies that.

And the plaintiff had judgment.

Case 498.

Lenox against Boddington.

Imparance, not necessary to have entry of *defendit vim et injuriam*.

ONE pleaded a foreign plea after imparance, which could not be.

But it was objected, not to be after imparance, because there was no entry of *defendit vim et injuriam*.

But PER CURIAM, That is not necessary to an imparance.

Marley

Michaelmas Term, 11. Will. 3. In B. R.

Marley *against* Blunt.

Case 499.

IT was pleaded to an action in this court, that there was another action for the same cause depending in the common pleas; *nil tunc record* pleaded; rejoinder, that the defendant had discontinued the action in the common pleas; and to that demurrer, and *resp. ouster*. Action discontinued, is not action pending.

Bromefield *against* Snoko.

Case 500.

PER CURIAM. "Thou hast no more but what thou hast got Words. "by cozening and cheating;" not averring that he was of any trade, or that he had anything; is not actionable (a).

(a) Same point, *Savage v. Robery*, 1. Salk. 694. *Tamlin v. Hamlin*, 1. Show. 181. *Ludwell v. Hole*, 2. Stra. 696. *Davis v. Miller and his Wife*, 2. Stra. 1169. *Shinman v. Shellitto*, 3. Burr. Rep. 1688. *Todd v. Hastings*, 2. Saund. 307. So also to say "You are a swindler," are words not in themselves actionable, because the word *swindler* means no more than *cheat*, *Saville v. Jardine*, 2. H. Bl. Rep. 531. But such expression, if written and published, is libellous, *L'anson v. Stuart*, 1. Term Rep. 748.

Pierceson *against* Hulls.

Case 501.

ERROR assigned of a judgment from the court of common pleas, that there was a miscontinuance, the continuance being from one day to another in the same Term; which, as was urged, could not be, Term being but one day in law, A continuance may be from one day to another in the same Term.

But it was over-ruled.

S. C. 2. Lutw. 638.

S. C. New Lutw. 524.

ANOTHER ERROR was, that the time of imparlance was to *quind. Pasch.* instead of "*a die Pasch. in quindecim dies.*" Imparlance how to be entered.

Quod etiam fuit rejectum PER CURIAM.

* [308]

* Moisy *against* ———.

Case 502.

INDEBITATUS for goods had from the plaintiff, without saying "fold," and that moved for exception, but over-ruled; for by Holt, Chief Justice, It would lie for rent or bond. Indebitatus for goods, not saying fold.

* The King *against* The Borough of Abingdon.

Case 503.

IT was a return to a *mandamus*, the filing whereof was opposed upon affidavits of several burgesses, that it was made by THE MAYOR in the name of the major part of the corporation, without consent of them. A return to a *mandamus* directed to a corporation, made by the mayor in the name of the major part of its members, without their consent, is a false return, for which an information lies against the mayor.—S. C. post. 401. S. C. 1. Salk. 431. S. C. 2. Salk. 699. S. C. Carth. 499. S. C. Holt, 440. S. C. 2. Ld. Ray. 559. Ante, 126. 6. Mod. 133. Cases T. H. 188. Stra. 55.

Michaelmas Term, 11. Will. 3. In B. R.

THE KING
against
THE
BOROUGH OF
ABINGDON.

IT WAS AGREED, that the return ought to have been by consent of the majority of the corporation, for they ought to answer the writ to whom it was directed; and it being directed to the whole corporation, it ought to be answered by the whole corporation, that is by the majority of them.

And HOLT, *Chief Justice*, said, If a writ come to the sheriff, and another make a return to it in his name, the sheriff may come and disavow it the same Term, but not in a subsequent one. *Dyer*, 182. So here will be two questions in this case: FIRST, Whether we ought to admit them to disavow this return? SECONDLY, In case we do it, Whether they ought not to do it in proper persons? For to examine here, upon affidavit, how that fact stands, is without example; but we will handle that person roughly that shall make a return in the name of the majority without consent; for as they cannot make a return, though they are the majority, without the mayor; so the mayor cannot make a return without the majority of them; and the return must come by the mayor's hands into court.

By the common law, if a charter fix a particular day for the election of a mayor, the election must be on that day.

NOTE, By their charter they are impowered to proceed to an election on such a day.

And by HOLT, *Chief Justice*, and TURTON, *Justice*, If they do not choose on that day, they cannot do it the next day, for they must pursue their patent, and that gives power only for one day; and though the mayor be sick, so as he cannot officiate that day, there is no remedy.

And TURTON, *Justice*, said, that in such a case they were forced to petition, in the *Case of the Corporation of Norwich*; and they said, they had known a *quæ warranto* gone against a corporation for choosing at another day.

But WRIGHT, then king's serjeant, and since lord keeper, was strong against this opinion (a).

9 [309]

And at last an * information was filed against the mayor for making a false and undue return; and the principal point was not determined.

(a) See now by statute 11. Geo. 1. c. 4.

Case 504.

The King against Kirk.

THE COURT may bail in murder, but very seldom do. S. C. ante, 304. KIRK was brought up by rule in hopes of being bailed, his trial having been put off as before (a); and *Latch*, 12. and 1. *Bulst. Egerton* and *Farrington* was quoted. S. C. 5. Mod. 454. S. C. Holt, 86. 1. Salk. 103. Andr. 65.

(a) See S. C. ante, 304.

But

Michaelmas Term, 11. Will. 3. In B. R.

But THE COURT remembered *Coke's* saying in *Bulstrade*, that they had power to bail one in case of murder, but he would not exert it without special command from the king; and that HALE used to say it rarely or never ought to be done.

THE KING
against
KING.

So he was remanded, there being two indictments of murder against him.

The King against Fuller.

Case 505.

IT was a conviction upon the statute of 8. & 9. Will. 3. c. 19. The complaint was laid to be made on the thirty-first of March, and conviction was on the third of April, and was, that he *modo habet et adhuc tenet*; and for this it was qualified, for that a fact on one day could not be on another day.

The evidence in a conviction must appear to be of facts prior to the information.

S. C. 2. Barnes K. B. 227. 396. S. C. 1. Self. Cases, 285. S. C. 1. Ld. Ray. 509.

Burch against Scory (a).

Case 506.

TROVER FOR GOODS; to which it was pleaded by the defendant, that he had bought them in *market overt*.

Sale in *market overt* must be at a convenient time.

HOLT, Chief Justice. You must prove the sale in market overt, and at a convenient time.

If goods be bought upon liking, the vendee must return them, otherwise his detaining, or not sending them back, is sufficient evidence of a liking. So if he declare his dislike, but afterwards disposes of them. So if goods be sold on liking, and before the day on which the party by the agreement is to return them, he sells or disposes of all or part of them, it is a liking; and time of liking or disliking of goods is eight days by act of ———.

Goods bought on liking must be returned in a convenient time.

(a) This was at nisi prius before HOLT, Chief Justice.

Hart against King.

* [310]

Case 507.

A BILL OF EXCHANGE was protested and lost, and an action brought against the drawer; and it was proved that the defendant had owned he had drawn the bill; and held good * by HOLT, Chief Justice.

In an action against the drawer of a lost bill, his acknowledgment of having

drawn it is sufficient.—S. C. Holt, 118. 1. Show. 164. Kyd on Bills, 139, 140. 270. Gilbert's Law of Evid. 119.

HOLT, Chief Justice, said, that this being an outlandish bill, the drawer was made liable by the protest; but no protest is necessary in a case of an inland bill (a).

Drawer made liable by protest of a foreign bill.

Also, that to make a bill payable to one's order was the same as if it were to him or order (b).

A bill "to my order," and "to A. or order,"

the same.—1. Salk. 133.

(a) See 9. & 10. Will. 3. c. 17. s. 2.; the 3. & 4. Ann. c. 9. s. 5.; Borough v. Perkins, 6. Mod. 81.; and 1. Term Rep. 170. Kyd on Bills, 136.

(b) Fisher v. Pomfret, Carth. 402.

AND

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Notice of protest must be proved in an action against the drawer of a bill.

AND HE SAID, that if the defendant could make it appear, that he was at any damage for want of notice of the protest, as if the drawee had failed in the mean time, &c. it would be incumbent upon the plaintiff to prove notice given of the protest in convenient time (a).

(a) See the statutes 9. & 10. Will. 3. and the case of *Harris v. Benson*, Stra. c. 17. f. 2.; the 3. & 4. Ann. c. 9. f. 5. 910. *Goostree v. Meade*, Bull. N. P. 271.

Cafe 508.

Bignoll against Rogers.

In debt on a certificate on 6. & 7. Will. & Mary, c. 17. the hand-writing of the Judge who granted it must be proved.

IN DEBT against the sheriff of *Bucks*, for the reward given by the statute 6. & 7. Will. & Mary, c. 17. to those that should discover and convict clippers and coiners.

NOTE, Here the plaintiff had a certificate from my Lord Chief Justice HOLT, who tried the malefactor, of his having been convicted on the plaintiff's evidence; which being produced, though under my lord's hand, yet it was proved by my lord's clerk to the jury.

On a certificate of conviction, a demand of payment attaches it as a debt on the sheriff.

S. C. Holt, 644.

And here HOLT, Chief Justice, held the demand of this debt of the sheriff, after the certificate, did attach the debt upon him; and that the money was to be paid out of the profits of the county, or, upon failure thereof, out of the exchequer; and that in such case the action would lie against the sheriff's executor, because given by act of parliament, and attached in the testator; but for the penalty given by the act against the sheriff for default of payment, that should not affect the executor; and that if the sheriff payed the debt and died, it should be allowed to his executor.

Cafe 509.

Holland's Cafe.

Interrogatories against an attorney.

HOLLAND, an attorney of the court, informed his client that he had entered up judgment two years before, but could not sue execution, by reason of the writ of error pending, when in truth there was no judgment entered; and for this notorious practice was ordered to answer interrogatories.

Recognizance discharged if interrogatories are not filed in a week. See 3.

AND HERE IT WAS AGREED, that if interrogatories be not exhibited in a week, the recognizance entered into for answering them is discharged of course.

Party has four days to answer interrogatories.

3 Hawk. P. C. 7th edit. 273. Saunders v. Melnith, 6. Mod. 73.

IT WAS LIKEWISE AGREED by the Court, and SIR SAMUEL ASHTEE, Master of the Crown Office, that in all cases the party has four juridical days to answer the interrogatories, though they be exhibited in Vacation; but if he do not answer in that time, he is to be committed upon motion.

* [311]

Cafe 510.

* Anonymous.

Excommunication.

PER HOLT, Chief Justice, If a man be excommunicated, a prohibition shall assaile him.

Anonymous.

Michaelmas Term, 11. Will. 3. In B. R.

Anonymous.

Case 511.

IN TROVER the case was this: The king's orders were issued upon the disbanding of the army, that each trooper should retain his horse; and this action was against a captain, who in breach of the said order had taken the trooper's horse.

A trooper may, on the king's order to retain his horse, maintain trover against his captain for detaining it.

AND IT WAS HELD that trover lay for the trooper in this case; for although, before, the property was in the king, yet by the order it was vested in the trooper, he having the possession at that time.

The King against Laurence.

Case 512.

AN INFORMATION was filed against him for writing a letter to Sir John Pigot, desiring him to moderate his zeal, for that the king, meaning King James the Second, would be soon restored; and that for further satisfaction herein, he would soon hear that many lords would repair to him to France; what to do he might guess. And being found guilty he was fined twenty marks, and committed till payment.

Information for writing a letter.

Steward against Floyd.

Case 513.

UPON a writ to the sheriff he first made a warrant to the bailiff of a liberty, and afterwards to his own bailiff, who arrested the party and suffered him to escape, and then the sheriff returned *mandavi balivo*.

Action against sheriff for false return.

Upon an affidavit of the fact the sheriff was ordered to attend:

And it was agreed, that an action lay against the sheriff for the false return, as *non est inventus*, &c. and his amercements were estreated.

The King against Slaughter.

Case 514.

SLAUGHTER was indicted upon 5. Eliz. c. 4. for using the trade of a *felt-monger*, not having served seven years to it.

A felt-monger is a trade within the 5. Eliz. c. 4.

IT WAS MOVED to be quashed, for that it was not a trade known at the time of making the statute. *Vide 2. Cro. 499.*

3. C. 2. Salt. 611.

But * after a rule nisi had been obtained,

3. C. 1. Ld. Ray. 513. S. C. Holt, 68.

HOLT, Chief Justice, said, that it was fit for a jury to try whether it were a trade then or not (a); and why not as well as try a prescription; and therefore was against quashing it upon that exception. And he affirmed that the trade of a *wool-comber* was within the statute (b), though the contrary had been adjudged in the fourth year of James the Second.

*2. Ld. Ray. 1179. * [312] 6. Com. Dig. "Trade" (D. 5).*

(a) See *Rex v. Thomas*, 4. Mod. 145. *Rex v. Lister*, 1. Str. 788.

(b) *Player v. Petit*, 1. Sid. 269.

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Case 515.

Trevanion *against* Tooker.

Judgment amended.

1. Roll. Abr. 201.
2. Vent. 217.
Cro. Car. 594.

A PLAIN mistake of the clerk in the entering up of judgment was amended in the next Term, by consent of the party for whose advantage the mistake was: *Ex motione* CARTHEW.

Cro. Jac. 628. 1. Ld. Ray. 897. Stra. 313. 1. Com. Dig. "Amendment" (R.).

Case 516.

The King *against* Tooley.

Motion for attachment for not obeying a peremptory *mandamus*.

Ante, p. 257.

TOOLEY had been a mayor of a corporation, and declined swearing in the mayor elect; and after a peremptory *mandamus* an attachment was moved for against him, upon affidavit that he kept out of the way, so that there could not be a personal service made to him; and that the writ had been left at his house; and ordered he should shew cause, &c. And a difference was taken between this and the case where money is to be paid on an award; for there there ought to be personal notice before attachment:—*Sed quære*, if it be not *par ratio*.

Case 517.

Dillon *against* Walcott.

On reversal of attainder of high treason, the *terretenants* should be served with *scire facias*.

S. C. post. 407.
Ante, 96.
Dyer, 34.
1. Sid. 316.
2. Salk. 495.

THE DEFENDANT's attainder of high treason being reversed for want of the words "*ipso vivente*" in that part of the sentence which concerns the burning of his bowels; and the judgment of reversal being affirmed in parliament; restitution was awarded by the king's bench in *Ireland*, without any *scire facias* against the *terretenants* of the patentees of *Walcott's* estate; and a writ of error brought into the king's bench hither, and this clearly allowed to be a good error (a).

But NORTHEY, since attorney-general, excepted against the writ, because it did not appear by it, who were parties to the award of restitution; for if the award of restitution be reversed, there must go a *scire facias* against the present *terretenants*, which cannot be if it do not appear by the writ who they are.

(a) But it is now settled, upon examination of all the precedents, that such *scire facias* is not necessary in the case of high treason. *Rex v. Stafford*, Mich.

Term, 12. *Ann.* 4. Hawk. P. C. 7th edit. ch. 30. l. 14. *notis*. See also *Bellingham's Case*, Dyer, 34.

* [313]

Case 518.

* Anonymous.

Ante, p. 225.

CONCERNING awarding execution in *Ireland* upon the reversal or affirmance of a judgment in *England*, were quoted *Yel.* 118. 3. *Keb.* 44. *Theſaurus Brev.* 165.; and that chancery cannot empower the courts of *Ireland* by *mittimus*, were cited *Kel.* 29. *Vaugh.* 393.

Case 519.

Anonymous.

A person in execution how to be charged.

Tidd's Pract.
Bellon's Pract.
2. vol. p. 88 to 97.

A is in execution at the suit of B. and charged with an action at the suit of C. who obtains judgment; he ought to charge in execution by *committitur*, and not by *capias satisfaciendum*, but he may have a *fieri facias*. But *quære*, if after he has charged him by

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by *committitur*, he may have *fieri facias*, he continuing so in execution. By the statute, if one in execution by *capias satisfaciendum* escape, the plaintiff may sue a *fieri facias*. ANONYMOUS.

Anonymous.

Case 520.

AN ACTION FOR WORDS was laid in *London*; and an affidavit for changing *the venue* was, that if any such words were spoken by him, they were spoke in the county of *Lancaster, &c.* *Venue* changed to the next county to county palatine.

And because the Court could not order a trial there, it being a county palatine, they changed *the venue* into the next county, viz. into *York*; though the proof lay all upon the plaintiff, who had all his witnesses in *London*, and that the defendant could not prove a negative, viz. that he had not spoke the words, otherwise than indirectly, by producing those that were in the room at the time; and that they did not hear any such words, or that no such discourse was, &c. Stra. 1216. 1258. 1270. 1. Will. 138. 221. 4. Burr. 2450. 2. Black. 962. Dougl. 262.

Anonymous.

Case 521.

A DECLARATION in ejectment had been delivered to one to whom the keys were given to let the house. Ejectment served on the person who had the keys.

PER CURIAM, Not good, because it should be to the tenant in possession; and he is only a servant, and the plaintiff is not without remedy, for he may sign a lease on the land (a). Barnes, 178. 188. 192. Stra. 575.

(a) See Mr. Serjeant Runnington's Legal Remedy by Ejectment, 155, 156.

Dair against The Earl of Stamford.

Case 522.

SIR BARTHOLOMEW SHOWER moved for a prohibition to the court of chancery, upon a writ of sequestration out of that court, whereby lands were sequestered; and suggested that the chancery was only a court of equity, having only jurisdiction over persons in case of disobedience to their decrees, and not otherwise; and he affirmed, that though it were called the high court of chancery, yet if it should go against law, or exceed its jurisdiction, it would be under the controul of the court of king's bench, for they upon *habeas corpus* will deliver one * illegally committed by them. And he said, that at first these sort of sequestrations were only granted in case of personal duty concerning land; but they ought not to sequester lands for a debt arising upon a personal contract not concerning the land sequestered. Motion for prohibition to the chancery. * [314]

HOLT, Chief Justice. You move for a stranger to the bill and answer, and proceedings in chancery; and therefore you must take your remedy at law. You do not tell that you have brought trespass against this sequestrator, and that they stop you by injunction out of chancery.

Y 2

And

Michaelmas Term, 11. Will. 3. In B. R.

Debit
against
THE EARL OF
STAMFORD.

And no more was done in this matter.

NOTE, I have heard THE MASTER OF THE ROLLS say, that that way of sequestration seemed now to have the countenance of an act of parliament, for that the statute of . Will. 3. did recite it, and allowed it. *Vide* statute.

Case 523.

The King *against* Taylor.

Information for offering to buy votes for parliament election. **L**EAVE was granted to file an information against one *Taylor*, for offering to buy votes, in order to election of parliament (a).

(a) See 7. & 8. Will. 3. c. 7. ; the 7th edit. ch. 67. f. 10. *nam*, where all the cases upon the subject are collected.

Case 524.

The King *against* Chaloner.

If a person be convicted on a penal statute which directs the penalty to be levied by distress, or for default the offender to be committed, and the justice directs his warrant of distress "To all Constables, &c." to which a constable of a parish in which the offender did not inhabit, returns that he had nothing within that parish, the justice cannot thereupon commit him; for *non constat* but he may have goods elsewhere.

CHALONER was convicted upon the statute of 3. & 4. Will. & Mary, c. 10. of deer-stealing, upon an information exhibited against him before a justice of the peace for killing several fallow deer, &c. *contra formam stat.* by which he had forfeited thirty pounds for each offence.

Upon non-payment a warrant was issued against him, directed "TO ALL CONSTABLES of the County," to have the money levied by distress. The constable of *Dale*, which appeared to be another parish than that where *Chaloner* was an inhabitant, returned that he had nothing in *Dale*, or any where else in the county. Whereupon the justice committed him to prison for a year, and to stand on the pillory. All this appearing on *habere corpus*,

EYRES moved to have him discharged; for the foundation of the commitment is his having not wherewithal to satisfy the several thirty pounds in the same county; and that is to be made apparent by a warrant to levy the same, which if illegally awarded or executed, the commitment is illegal; and all that shews want of distress here, is the return of the * constable of *Dale*, that he hath no distress in his parish, or in the county; a matter not lying in his knowledge farther than within his own parish.

ANOTHER EXCEPTION was, That the conviction was on the eighth; at which time he might have sufficient wherewithal to levy the penalty, and the warrant not made till several days after; and by the statute he is not committable, but for want of distress immediately after the conviction; and therefore the warrant ought to be made immediately upon conviction. *Idco* this warrant is illegal.

And it was agreed **PER TOTAM CURIAM**, that he was not to be imprisoned, but upon failure of payment and distress.

SIR BARTHOLOMEW SHOWER and **NORTHEY** *contra*. There is no way for justices to know the want of distress but this; they cannot

* [315]

S. C. 1. Sid. 156.

S. C. 1. Lev. 113.

S. C. Hok, 214.

S. C. Salk. 378.

S. C. 1. Ld.

Ray. 545.

S. C. 5. Mod.

446.

S. C. Carth.

501. 502.

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cannot direct their warrant to the sheriff, who is the universal officer of the county, because he is no officer to execute a warrant; but their proper officer is a constable; and the warrant being directed "To all constables," and delivered to one, it is the same thing as if it were delivered to every one of them in particular; and the justice cannot enquire by jury as a sheriff may, whether the offender has distress or not; so there is no other way but this which has been taken. A constable indeed is not compellable to execute a warrant out of his vill, but may lawfully do it if he please, and shall upon "not guilty" in false imprisonment give such a warrant in evidence: and if an inhabitant of *Clerkenwell* commit a felony in *Islington*, it is a good exception to an indictment against him, "that he of *Islington*, &c. in the county of "*Middlesex*, did, &c." the case of *Egerton v. Morgan*. Or if that be against us, it will be well enough this way: All the statute requires is, that justice of peace may make his warrant to levy, &c. by distress; and so any man, to whom such a warrant is directed, may execute it, and is a good officer to that purpose; and so this warrant shall be taken to be made to this constable, not *quatenus* constable, but *quatenus* a special officer for that purpose; and if he make a false return, they have their remedy against him by action. And can it be imagined they should stay for a return from every constable in the county, for the statute in powers to detain the offender for two days, that in the mean time they should know whether he has distress; which shews it must not appear by warrant, and return thereof from every constable in the county, for that is not practicable in so short a time; and this being a penalty, it lies upon the offender to exempt himself thereof, by shewing where he has a distress.

THE KING
against
CHALONER.

* HOLT, *Chief Justice*. Your commitment is not pursuant to the statute; for that is indeed that there should be a warrant made by the justice to levy the money by distress, and a return thereof made; but not, that if it should be returned that he has no distress, that thereupon he should commit him; and here the commitment is a judgment; and therefore you ought to be satisfied that he has no distress, and make a record thereof, and say, "forasmuch as it does appear unto me, that he has no distress, I do hereby, &c." (a). For, what authority has the constable of *Dale* to return that he has no distress in the county at large? No doubt a warrant "To all constables" is a warrant to every particular constable, and every one of them is bound to execute it in his particular jurisdiction. And when a warrant is directed to a constable by name of a constable, it must be intended to be directed to him as constable.

* [316]

GOULD, *Justice*, seemed to incline, that if this had been a warrant directed to the constable of the vill where the offender

(a) See *Dr. Bonham's Case*, 8. Co. 114. *S. C.* 2. *Brownl.* 255. *S. C.* *Hughes Ent.* 126.

Michaelmas Term, 11. Will. 3. In B. R.

THE KING lived, and he had returned that he had nothing in the vill, it would
against
CHALONER. have been well.

But the prisoner, upon this exception, was discharged.

Cafe 525.

Anonymous.

Colour remedied
by replication.

HOLT, Chief Justice. If, in bar, the defendant fail of *giving colour* where it is necessary to give colour, that omission is remediable by the plaintiff's replication; for he ought to take advantage of lack of colour before he replies.

Cafe 526.

Stringer *against* Alifon.

Where courts
held, should be
set forth.

S. C. Ld. Ray.
532.
Post. 318.

PER CURIAM. Where anything is set forth to be in the court of king's bench or chancery, it ought likewise to be set forth where those courts were kept; and 27. *Hen. 6. pl. 10.* a writ was abated for want of it (a).

(a) This was a *scire facias* against bail: *Chief Justice*, said, the exception was very slight, and that it should have been shewn as cause of demurrer: and therefore judgment was given for the plaintiff. 504. *Yelv. 227.* were cited: But **HOLT**,

Cafe 527.

Newton *against* Rowland.

An attorney ex-
ecutor shall not
have privilege.

S. C. 1. Salk. 2.
S. C. 1. Ld.
Ray. 533.
Salk. 7.
Hob. 177.
2. Sid. 157.
Noy, 68.
Poph. 329.
Seldon's Pract. 2. vol. 79.

DEBT against an attorney *as executor*, who pleaded his privilege, &c. and upon demurrer,

IT WAS URGED *for the defendant*, that the reason of privilege in that case was in respect of his personal attendance, which was equal whether sued in his own or *in auter droit*.

But by **HOLT, Chief Justice**, The authorities are on the other side in this case.

And the plaintiff had judgment *nisi*.

* [317]

Cafe 528.

* The Earl of Kent *against* Walters.

Writ of enquiry
set aside in no-
ver, because
evidence of va-
lue was refused.

TROVER for several loads of wood, and judgment by default, and writ of enquiry executed,

IT WAS MOVED to set aside the writ of enquiry, upon affidavit that the sheriff refused to receive any evidence of *the value* of the wood, but directed the jury to find the full damages declared of.

And for that it was set aside, upon payment of costs.

And

Michaelmas Term, 1 r. Will. 3. In B. R.

And in this case NORTHY said, that a lord of a manor might cut trees on copyhold, by general custom of copyhold, or else, if it were copyhold in fee, that wood would never be cut; which would be inconvenient.

The lord of a manor cannot cut trees on the estate of a copyholder.

See Ashmead v. Ranger, post.

But HOLT, *Chief Justice*, Surely he cannot, for the copyholder has the same interest in the trees that he has in the land; and I always have taken it so.

378.

The King *against* Patting.

Case 529.

PATting, being convicted of a riot, moved before judgment upon the *poslea* returned, to submit to a fine; and having shewn by affidavits that the riot was in resisting one, who, by pretence of process of the admiralty, would seize on goods he had distrained for rent, he was discharged.

On conviction of riot submitted to a fine discharged.

Ante, 235.

And PER CURIAM, The *poslea* ought to be returned the next Term after the trial.

Anonymous.

Case 530.

HOLT, *Chief Justice*. Upon a writ of error from the common pleas, if the record certified be faulty, of common right a *certiorari* may go to certify the right record.

Certiorari lies in error to bring in the right record.

Chanler *against* Driver.

Case 531.

A SUBMISSION to an award being by rule of Court, MOUNTAGUE moved for an attachment for non-performance.

Payment on an award must be demanded before an attachment can issue.

CURIA. There ought to be affidavit of award demanded, &c. and we never grant an attachment for non-payment of money upon an award the first day, though the defendant be to do the first act (a).

(a) For the course of proceeding to obtain an attachment for non-performance of an award, see 1. Crompt. Craft. 269. 2. Bl. Rep. 990. and Kyd's Treatise on the Law of Awards, 216.

* [318]

* Worley *against* ———.

Case 532.

IT was found by verdict, that a warrant of attorney was forged; and judgment entered according to it was set aside upon motion.

Judgment on a forged warrant set aside.

Michaelmas Term, 11. Will. 3. In B. R.

Cafe 533.

Anonymous.

Fine must be absolute.

Vide Keyl. l. 24.

HOLT, Chief Justice. A fine ought to be absolute, and not conditional; and therefore a fine, unless such a thing be done *in futuro*, is void. And by the common law, a fine for non-repairing of a highway was for the default in not repairing the highway, and ought to be absolute; but by a late statute the fine is to go towards the repair.

Cafe 534.

Anonymous.

If a record be pleaded, it must be shewn where it is.
Ante, 316.

PER CURIAM. When a man pleads a record, he ought to shew where it is, that the Court may have it; as if a record of the court of king's bench be pleaded, to shew it is *apud Westmonasterium* in the county of *Middlesex*.

Cafe 535.

Corps against Kitchen Hall.

Bail additional of what Term to be.

Sellon's Pract. 265.

BAIL was put in in *Michaelmas Term*, and excepted against, and additional bail put in in *Hilary Term*.

The doubt was, whether the additional bail were of *Michaelmas Term*; and some said the bail must refer to the return of the writ; and others would have it refer to the recognizance entered into. The mischief would be in this case, to make the bail refer to *Michaelmas Term*, that if bail had aliened *bona fide* in the *interim*, to have the land charged with the recognizance by that relation.

HOLT, Chief Justice. It has been an old question, Whether bail in this court be liable from the time of the recognizance, or from the time of the judgment.

And THE COURT here ordered proceedings to stay till they had considered of it.

Cafe 536.

Sherwin against Sir Walter Clarges.

Trial at bar in ejectment.

4. Mod. 379.

2. Lev. 66.

6. Mod. 309.

1. Keb. 827.

2. Black. Rep. 1158. Run. on Eject. 419.

WHEN it appears to the Court that a suit is vexatious, they will not grant A TRIAL AT BAR in ejectment, without naming a sufficient plaintiff.

And by favour of the Court one may have a trial at bar, though he sue *in forma pauperis*.

* [319]

Cafe 537.

* Anonymous.

Vagrant may be sent to his last settlement.

HOLT, Chief Justice. If a vagrant be sent to the place of his birth, they may send him to the place of his last legal settlement (a).

(a) For the removal of vagrants see the statutes 17. Geo. 2: c. 5; the 32. Geo. 3. c. 45. 2. Hawkins's P. C. 7th edit. ch. 94. and Mr. Conft's edit. of Bott's P. L. 1. vol. 334. 414. 635. 637. 2. vol. 782.

Richardson

Michaelmas Term, 11. Will. 3. In B. R.

Richardson *against* Williams.

Case 538.

A VERDICT in a civil cause may be given in evidence in a criminal cause; but not *vice versa*; and THE COURT said, they would hardly grant a new trial, where a verdict might become evidence in a criminal cause.

Verdict may be given in evidence.

Shoot *against* Higgs.

Case 539.

BAIL upon writ of error cannot discharge himself upon surrendering his principal.

Bail in error.
1. Stra. 419.
1. Burr. 340.

The King *against* Warburton.

Case 540.

IF RULE be for filing an information, and non-process thereupon for non-appearance of the defendant, a new one cannot be without a new rule; for the first was executed.

Information.
Post. 325.

And here THE COURT gave a new rule, upon payment of costs.

Orby *against* Pullen.

Case 541.

AN AVOWRY was, that J. S. being seised in fee of such and such parcels of land, did by his deed, &c. grant a rent-charge of, &c. out of them *per nomina*, &c. *inter alia*, &c.

Avowry for a rent charge, whether all the lands charged should not be named.

The exception taken was, That the avowant ought to name all the lands charged, and not by way of *inter alia*; for the defendant might then plead entry and suspension, extinguishment, &c. in respect of the parcels omitted; and it would be so in an assize, for there all the land must be put in view, and the tenants all named.

Vide 7. Co. 3. 2.

It was offered *contra*, that indeed where the grant is out of several particular parcels in certain, there those parcels ought to be certainly named in the avowry; but where the grant is general, there it will be enough to name one place certainly, with an "*inter alia*." Vide Co. Ent. 590. 6. Co. 39. * Finch's Case. 5. Co. 69. 1. Co. 54. 143. Hearn's Pleader, 761. 1. Saund. 189. 2. Saund. 195. 1. Comf. Ent. 273. 276. Winch, 951. 979. 1013.

* [320]

And it was said, that multitude of precedents would make a law, 3. Cro. 326. Cro. Car. 520. and Bredon's Case; but seemed to approve of the exception; for he said, that in avowry it would be ill to say that he demised such land *inter alia*. Vide 2. Cro. Stoner v. Corbet.

The

Michaelmas Term, 11. Will. 3. In B. R.

Cafe 542.

The Duke of Ormond *against* Ireland.

Bond to follow the suit with effect is not forfeited by suing an injunction. **A** BOND was given to an officer conditioned, that the plaintiff in replevin would follow the suit with effect. Afterwards he sued an injunction in the exchequer, whereby the proceedings were delayed. But *PER CURIAM*, That is no forfeiture of his bond; nor nothing else is, but an absolute determination of suit, as nonsuit, *non prof. &c.*

S. C. post. 380.

S. C. Carth. 519.

S. C. Holt, 127.

Cafe 543.

Jennison *against* Ellis.

Original of a different Term than the *placita*, no original. **W**ANT of an original was assigned for error. And the original certified being of another Term than the *placita*, and no continuance,

S. C. ante, 235.

THE COURT would not allow it for an original. *Cra. Car.* 281. 272. *Yelv.* 108. that it must be an original of the same Term with the pleading, or at least pending the pleading.

Cafe 544.

The King *against* Sergeant.

Non prof. against one defendant no release to the rest. **V**ERDICT was against three jointly, and *non prof.* entered as to one, and judgment against the other two. *Vide* 6. *Edw.* 3. *pl.* 31. 2. *Cro.* 211. *Co. Ent.* 172. 650. 676. 303. 1099. that if there be several defendants, a *non prof.* against one is no release as to the rest. *Hilary Term*, 3. *Will. & Mary*, Roll 759. *vide* *Hob.* 79.

Cafe 545.

Anonymous.

The *hustings* is the county court of London. **H**OLT, Chief Justice. The hustings is the county court in London, and the sheriff may grant a replevin out of it as such by the statute of *Westminster the Second*. 4. *Inst.* 247. *Lex Lond.* 105. *Lev.* 309. 1. *Bac. Abr.* 657.

* [321]

Cafe 546.

• Pierce *against* Hutcheson.

In debt on bond for performance of covenants, *viz.* that for all breaches till such a time covenant had been brought, and no breach since, is no bar. **D**EBT was brought upon a bond for performance of covenants; the defendant pleaded in bar, that for all the breaches till such a time he had brought covenant, and recovered damages, and that there was no breach since that time; and demurrer. And judgment was given for the plaintiff; for by the very plea the bond was forfeited. Though *CARTHEW* objected, that one might waive the benefit of a forfeiture of a bond, as well as the forfeiture of a copyhold estate, &c. and the bringing of covenant was a waiver of the forfeiture of the bond, and so a bar.

But

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But PER CURIAM, Even in equity it would be no bar till satisfaction; as if two be bound in a bond, judgment against one is no discharge to the other before satisfaction.

Postea Patth.
12. Will. 3.
Duke of Or-
mond v. Brierly.

Regula Generalis.

Cafe 547.

UPON occasion of a dispute between MR. HARCOURT, Secretary of the crown side, and LADY ASH, about the due inrollment of a deed, a rule of Court was made, that all deeds should be inrolled on the plea-side, and acknowledged in the face of the Court.

Deed to be in-
rolled on the
plea side of the
court.
S. C. Salt.

— against Goudier.

Cafe 548.

A. Avowed as a bailiff for rent; his being bailiff not traversable. Per HOLT, Chief Justice (a).

Bailiff travers-
table.

(a) *Quare tamen*.—See Bull. N. P. 55. W. Jones, 253. Culley v. Spearman, 8. H. Bl. Rep. 386.

The King against Shortell.

Cafe 549.

INDICTMENT was for the rescue of one taken by process of the marshalsea, said to be returnable *apud Westm. in com. Surrey*. And for this it was moved to quash it.

An indictment
stating a writ
returnable at
Westminster in
Surrey.

But THE COURT would not intend but that there was a place called *Westminster* in *Surrey*; therefore would not quash it.

Philips against The Bishop of Salisbury.

Cafe 550.

TWO jointenants of an advowson by deed made a partition to present by turns; and afterwards one of them granted over his share; the grantee presented in his turn, and * the bishop refused to admit his clerk; whereupon the grantee alone brought a *quare impedit*.

Jointenants of
an advowson
may, by deed,
make partition
of it.

* [322]

CARTHEW objected, that the inheritance of an advowson was in its nature indivisible, and as intire as that of a villein; and that if two jointenants of an advowson agree to present by deed in their turns, such agreement would work no severance of the jointure, but that remained; but if one of them after disturb the other, his remedy was by covenant; and quoted 2. *Mod.* 97. And he said, that doubtless one jointenant, or tenant in common of an advowson, might make a voluntary partition of the right; after which they shall have several writs of right of advowson for their several moieties. *Fitz. N. B.* 62. If there be two or more coparceners of a manor, they may make partition to have one part of the demesnes

demesnes

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PHILIPS
against
THE BISHOP OF
SALISBURY.

mesnes and service to one, and another part to the other; and the advowson by the same agreement to be by turns; it will be appendant to their respective shares. 6. Co. 12. 2. Rol. Abr. 255. Fitz. tit. "*Quare Impedit*," pl. 170. Co. Ent. 496.

And accordingly it was adjudged for the plaintiff, at another day, PER TOTAM CURIAM. 2. Inst. 362. Dyer, 29. Plowd. 194. F. N. B. 62. 10. Hen. 4. pl. 10. Co. Ent. 496.

Cafe 551.

The King *against* Higgison.

An indictment for maintenance concluding *con. stat. generally* cannot be tried under a *mittimus* describing it as on a particular *statut.*

S. C. 1. Ld. Ray. 537.

INDICTMENT for maintenance, concluding *contra formam stat. generally*. The *mittimus*, whereby the record was sent to be tried in the county palatine of *Chester*, was to try an indictment for maintenance *contra formam statuti* of 32. Hen. 8. c. 9. And maintenance being made penal by the statute of *Articuli super Chartas*, and the 1. Rich. 2. c. 4.

IT WAS HELD that the matter was not duly tried, their power by the *mittimus* being confined to maintenance by the statute of 32. Hen. 8. c. 9. and the indictment being at large: PER TOTAM CURIAM.

Cafe 552.

Mayor of Norwich's Cafe.

In cafe for false return to a *mandamus*, need not alledge they ought to obey it.

IN AN ACTION upon the cafe, for a false return to a *mandamus*, against the mayor and aldermen of *Norwich*, it was objected, that it was not alledged that it belonged to them to obey the writ. But PER CURIAM, By their alledging a reason why they could not obey the writ, they admit that.

Cafe 553.

Anonymous.

Child and ideot follows father's settlement.

* { 323 }

Carth. 433.

S. Mod. 87.

PER CURIAM. The child shall follow the settlement of its parent, unless he gain a distinct settlement; and before the statute of 1. Jac. 2. an ideot could gain a settlement, * for till then notice was not necessary; but since he shall follow the settlement of his father.

Foley, 165. 11. Mod. 267. Mr. Conft's edit. of Bott's P. L. 2. vol. 1. to 18.

Cafe 554.

The King *against* The Inhabitants of Kingston Bowsey.

An order of removal *quashed*, is only final as to the parish concerned.

S. C. 1. Ld.

Ray. 513.

A POOR person was sent, by order of two justices, from the parish of *St. Michael* to that of *Kingston Bowsey*, and upon appeal the order was quashed.

And PER CURIAM, That judgment shall not bind the parish of *St. Michael* from sending him to another place of settlement (a).

S. C. Carth. 816. S. C. Sett. & Rem. 277. S. C. Salk. 486.

(a) See *Thackham v. Swindon*, Salk. 489. *Mynton v. Stoney Stratford*, 2. Salk. 527. *Swaincomb v. Shensfield*, 2. Salk. 492. *Rex v. Bishop's Walton*, Foley, 275. *Cirencester v. Coke St. Aldwin's*, Burr.

S. C. 17. *Rex v. Fradenham*, Burr. S. C. 394. *Rex v. Entley*, Burr. S. C. 425. *Rex v. Leigh*, Casl. 59. and Mr. Conft's edition of Bott's Poor Laws, 807 to 818.

The

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The King *against* Hoskins.

Cafe 555.

EXCEPTION was taken to an indictment for a rescous.

An indictment for a rescous need not alledge the non-consent of the plaintiff.

THE FIRST EXCEPTION was, Because it was said, that it was without consent of the sheriff; but it might be by consent of the bailiff or the plaintiff.

Sed non allocatur (a).

THE SECOND EXCEPTION, Because the arrest was not laid to be before return of writ; which was allowed good.

On indictment for rescous, arrest must be laid

to be before the return of the writ.

HOLT, *Chief Justice*, upon this occasion said, that a common fine for a rescous was four nobles.

GOULD, *Justice*, said, that in the common pleas they would have the original action tried in a feigned issue, before they would let the action for rescous go on.

(a) *Rex v. Warden of the Fleet*, post. 337.

The Parish of Bloxom *against* The Parish of Kingston. Cafe 556.

AN ORDER OF SESSIONS was quashed, for that it was, that the person was "likely to become chargeable, as we are credibly informed (a)."

Order quashed, not being certain.

(a) This has been held too uncertain in the following cases: *Rex v. Wykes*, Andr. 238. *Trowbridge v. Weston*, 2. Salk. 473. *Suddelcomb v. Burwash*, 2. Salk. 491. *Reg. v. Waltham Magna*, Sett. & Rem. 38. *Reg. v. St. Mary*

Ottery, Sett. & Rem. 32. *Stallingburgh v. Haxhay*, 1. Sess. Cases, 131. But now by 35. Geo. 3. c. 101. no person shall be removed until they become actually chargeable.

The Parish of Grindon, in Northamptonshire, *against* The Parish of Overcott, in Warwick. Cafe 557.

A CONDITIONAL ORDER was made, "in case the court of a king's bench should be of opinion, that, where a servant was hired at a fair ten days after Michaelmas until Michaelmas next, such hiring and service did gain a settlement, then, &c." and for this the order was quashed.

* [324]

* Hufley *against* Fiddall.

Cafe 558.

ERROR of a judgment in the common pleas, in an *indebitatus assumpsit* by the assignee of a commissioner of bankrupt.

If goods be sold by a bankrupt after the act of

bankruptcy committed, his assignees may affirm the contract, and bring an *indebitatus assumpsit* for the money, or disaffirm the contract and bring *wreuer* for the goods.—S. C. Holt, 95. S. C. 3. Salk. 59. 7. Mod.

The

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HUSSEY
ex parte
FIDDALL.

The exception was, That it was for goods sold after the bankruptcy committed; and the action should be *trover*, and debt would not lie therefore, because *trover* might be brought for it again.

HOLT, *Chief Justice*. They may avoid the sale, if they will, and bring *trover* for the goods; but if they bring the one, they shall not afterwards bring the other. By the act of bankruptcy the property of the goods is in the bankrupt's creditors (a); and if it be a *chose in action* that is assigned, the assignee is to have the same remedy for it as the bankrupt himself might have had; as if it be money received to the use of the bankrupt, they are to have such remedy as he might have had for it; and without doubt the action well lies here, and even a general *indebitatus* would have done.

NORTHEY, *at the Bar*. If a man receive a thing to my use, I may say that it was received to my use, and bring the proper action in such case; or, without any such suggestion, bring *trover*.

HOLT, *Chief Justice*. *Indebitatus* was brought for money received upon a usurious contract; but it was held that it would not lie (b); and KEYLING, *Chief Justice*, would allow it against a receiver or factor, but HALE, *Chief Justice*, would not. By my consent it shall go as far as it has gone, but not a step farther. It has been held to lie for a *fine* by custom (c); but surely that was hard, for it was to leave matter of law to a jury.

Vide 1. Sid.
223.

But NORTHEY said, some strains had been in favour of remedy; and he said, that if a man, pretending title to my land, receive my rent, and get my tenants to attorn to him, an *indebitatus* had been maintained for the money.

Which HOLT, *Chief Justice*, agreed; but said, that had been very hard too.

(a) The property of every part of the bankrupt's estate is, by the act of bankruptcy and assignment, so fully vested in the assignees, 2. Bl. Com. 485. that the bankrupt is not entitled to recover from his estate even the necessary subsistence for himself and family, except by the favour and indulgence of the assignees and creditor. Thompson, Ass. of Nelson, v. Councill, 1. Term Rep. 157.; and the creditor of a bankrupt in England, who, subsequent to the bankruptcy, recovers a debt due to the bankrupt in a foreign country by process of attachment in that country, is not entitled to retain the money so recovered to

his own use, and therefore the assignee may recover it in an action of *assumpsit* as money had and received to their use for the benefit of the creditors, Hunter, Assignee of Blanchard and Lewis, v. Philips, 4. Term Rep. 182.; and this adjudication was confirmed on a writ of error to the exchequer chamber, 2. H. Bl. Rep. 402.

(b) See Tompkins v. Bernet, 1. Salk. 22. Smith v. Bromley, Dougl. 697. and 1. Term Rep. 286.

(c) Shuttleworth v. Garnet, 3. Mod. 239. 1. Show. 35. Comb. 251. Grant v. Aftle, Dougl. 728.

Anonymous.

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Anonymous.

Cafe 559.

ONE who was summoned before a Judge, to shew cause why *common bail* should not be taken, did not come; whereupon a day was given for him to come, or else that common bail should be; he comes before the day, and consents to common bail, which was accordingly filed; and at the day came to make oath of a debt above ten pounds.

Common bail being regularly filed, oath of debt being above 10l. not to be received.

But *PER CURIAM*, It ought not to be received, bail being regularly filed.

* [325]

• The King *against* The Town of Hartford.

Cafe 560.

IN the case of the information against the town of *Hartford*, after it was filed, at another day, the Court was moved to stop it, if there were not security for costs according to the late act of parliament.

Information filed, though no security for payment of costs, shall not be stopped.

HOLT, Chief Justice. I doubt me you are too late after the information filed, especially by motion, but perhaps you may plead it.

Anonymous.

Cafe 561.

PER HOLT, Chief Justice, at *nisi prius*. If a ship be insured under *Captain J. S.* the part-owners may change the captain without notice to insurers (a).

Captain of a ship insured may be changed without notice to insurers.

(a) *Quere tamen*, for it might be the confidence and knowledge of the captain might be an encouragement to the in-

surers.—NOTE to the former edition: See Park on Insurances, 19. 290.

Anonymous.

Cafe 562.

THE SOLICITOR GENERAL moved for leave to enter a *non prof.* upon an information, in order to file another.

A second information not to be filed till the first be discharged. Ante, 319.

SIR SAM. ASHTREE, *the Master of the Crown Office*, said, the course was to come to him, and pay costs upon the information, and then to enter a *non prof.*

And *PER CURIAM*, You shall not file a second before the first be discharged.

— *against* Deer.

Cafe 563.

A PROHIBITION was moved for to the consistory court of *Landaff*, where a libel was for fraudulently taking away a will that was proved with them there, in order to cheat the legatees.

Libel lies in the spiritual court for fraudulently taking away a legatees.

will which had been proved, with intent to cheat the

GOULD,

Michaelmas Term, 11. Will. 3. In B. R.

*against
Debt.*

GOULD, *Justice*. Here is a will properly lodged, and if any fraudulently take it away, what remedy have they? for an indictment or information will not restore them the will; and detinue will not lie for them, because they have no interest in it.

TURTON, *Justice, accord.*

HOLT, *Chief Justice, contra.* The probate is authority enough for them to go on, though the will be lost; and the offence need not go unpunished, for they may have indictment or information; and this is not like cases of beating in the church-yard, where the statute gives them power, though it be punishable at common law; nor beating in the church itself, where they proceed *pro reformatione morum* only.

And no prohibition went.

• [326]

Cafe 564.

• Oldham *against* Rightson.

Mortuary may be sued for in the spiritual court, if custom be not denied.

Cro. Eliz. 151.
Cro. Car. 258.
3. Mod. 268.
Lutw. 1069.

A MORTUARY was sued for in the spiritual court of *Chester*, and a prohibition was moved for, upon suggestion, that there was no custom to pay mortuary in that parish.

And it was agreed, they may sue for mortuaries in the spiritual court, if it be admitted there is any due (a); but the statute of *Circumspelte Agatis* makes no more provision for mortuaries than it does for tithes, or a *modus* of them; and in a suit for a *modus* the custom may be traversed. *Hob. 247.* If in a suit for a *modus*, the *modus* be admitted, they shall proceed; *secus* not. *Cro. Elin. 151. Cro. Jac. 257.* and the case of *Brown v. White (b)*, it was a controverted point; but then it was a more difficult point to obtain a prohibition than it is now that statute give costs; and then the Court would not grant a prohibition without oath of the truth of the suggestion. *Vide 2. Keb. 835. 867.* where it is admitted they may sue for a mortuary, unless the custom be denied.

And THE COURT was for granting the prohibition, it being a doubtful point, to have it settled; and that the being of costs seemed to be a notable ingredient in the case; and the statute of 21. Hen. 8. c. 6. provides that they shall demand no more than they had by custom; which though it be restrictive of their jurisdiction, yet shews they have jurisdiction of mortuary.

But the other side offering affidavits of uninterrupted usage,

HOLT, *Chief Justice*, said, that might be something; for though there were a good suggestion made, yet, if it appeared to them to be merely for delay, they would not grant a prohibition; and that was the reason of the rule of requiring affidavit of the truth of suggestion.

(a) See *Torrent v. Burky*, 2. Stra. 775.

(b) *Ray. 75. 1. Lev. 98.*

Anonymous.

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Anonymous.

Case 565.

BY the course of the Court after affidavits are filed on both sides, Reading affidavits and a day given for the hearing of Counsel, there shall be no viz. new ones read, but such as are affirming the old ones ; which ought to contain no new matter.

Anonymous.

Case 566.

HOLT, Chief Justice. An officer in London may take away Appearance compelled by distress. some parcel of the party's goods to compel an appearance ; but it must be a reasonable parcel ; and upon attachment of goods there, the custom is to leave them in the party's hands till the matter be determined.

* [327]

* Hamley against Hendon.

Case 567.

COVENANT upon a deed of demise by the plaintiff's testator A covenant to grind all his corn at the lord's mill is not restrained to such corn only as grows on his premises. to the defendant of several parcels of land, reserving rent and suit of court, in which the lessee covenanted to grind all his corn and grains that he should spend in domestic use, at the mill of the lessor's manor ; and breach assigned, that there were five hundred barrels of wheat ground and used in the defendant's house which he did not grind at the said mill, or any part of them : and to this a demurrer.

FIRST OBJECTION. This covenant, by operation of law, extends only to such corn as should grow upon the premises ; and it is not averred to be so ; and for this was quoted 1. Sid. 374.

But **PER CURIAM**, The covenant is express and general of "all his corn, which he should grind for the use of his house," and nothing appears to restrain it against the words.

But upon **ANOTHER EXCEPTION, viz.** That it was not averred, A breach of covenant for not grinding all his corn at the plaintiff's mill, must allege that the corn was the defendant's. that the corn was his at the time of the grinding, and it might be another's at time of grinding, and after bought by the defendant, and so not within the covenant ; the meaning and words whereof were, that he should grind *all his* corn which he should use in his house at the plaintiff's mill ; for the defendant might have a mill of his own, and grind another's corn there, and afterwards buy it for his house ;

Judgment was given for the defendant.

Blank against Newcomb.

Case 568.

A LIBEL was in the spiritual court for not paying a parish-rate The spiritual court cannot make a rate, but may excommunicate for not making one.—S. C. Holt, 594. for repairs of the church ; and it was suggested, for a prohibition, that all parish-rates were to be by a majority of the parishioners ;

BLANK
against
NEWCOMB.

As to THE FIRST it is urged, its not being by majority of the parishioners was a matter only proper for *an appeal*, and so is the inequality of the rate. 2. *Bull.* 280.

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And here a prohibition was granted.

Anonymous.

HOLT, Chief Justice. One may be sued as executor and as heir both; for why may not a man make use of both his securities.

Cafe 570.

The King *against* Speed.

A CONVICTION for deer-stealing against him being removed up by *certiorari*, and affirmed here (a), a *levari facias* issued out to levy the money.

FIRST, Because this is made a particular offence, and punishable in a precise manner, and strictly according to the words of the statute, being against MAGNA CHARTA; and therefore not *scilicet* out of that court, for the record cannot be remanded to the justices. — And the writ must not only be seized, but fold by virtue of such writ, although the statute on this point only says that the forfeiture "shall be levied by way of distress."—S. O. C. Carth. 502. S. C. x. Id. Ray. 583.

Salk. 379. S. C. Carth. 502. S. C. r. Ld. Ray. 583.

(a) See S. C. 1. *Ld. Ray*, 584.

to

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to have the aid of the process of this court to levy the money, no more than they shall have the help of indictment or information originally.

THE KING
against
SHEPP.

SECONDLY, If this course shall hold, the act will be more penal than was designed; for thus his goods in any county in *England* may be liable, whereas the statute only subjects his goods in the county where the offence is committed; for if there be none in the county where this process is directed, and that be returned, a *testat.* may be, and thereupon a *levari* into any other county, &c.

THIRDLY, The statute directs the money shall be levied by warrant, which is not pursued.

FOURTHLY, The prosecutor himself may remove the conviction and intitle himself to this process; and for aught appears to the Court it was so here. *Vide Hutt.* 117, 118.

FIFTHLY, At * this rate the offender may be doubly punished; for suppose the sheriff levies twenty pounds, still the party shall be liable to a year's imprisonment, and pillory besides; for the statute ordains it so in case of failure of distress to the value of thirty pounds, which inconveniency would not ensue in case of process to the constable; for the constable, in case of failure of distress to the full value, shall not sell the goods, as the sheriff must; so the party, after he has undergone the punishment of imprisonment, &c. shall have his goods again; and he quoted a case in *Michaelmas Term*, in the twenty-third of *Charles the Second*, 2. *Keb.* — *v. Felton*. If any process may be awarded out of this court, it must be a *distress*; the words of the statute directing it to be "by way of distress of the goods of the offender," without saying, "distress and sale of goods," and in such case the officer shall not sell; for where an act has a known term in law, it shall be interpreted according to the law's acceptance of such term; and distress for rent at common law was not to be sold, but to remain in nature of a pledge; and so here it ought only to be, in order to enforce a payment. *Dyer*, 280. in case of return irrepleviable, the avowant shall not sell. 4. *Hen.* 6. pl. 17. 1. *Rel. Ab.* 887. If debt be recovered in a court-baron, they can only distrain, but not sell, but only detain it till payment: and it is made a doubt, if a *certiorari* be of a judgment in an inferior court of record, this court shall award execution. 1. *Keb.* 733. If distress be given by a penal statute, it shall not be sold; and therefore it is that some statutes do expressly put in the words "distress and sale of goods;" and that the statute of 43. *Eliz.* hath those words. *Allen*, 92. That commissioners of sewers may sell, though there be no such words, but the statute has words tantamount; for it is, "that the amercement shall be levied, and the party punished according to their discretion;" and besides that, they may proceed according to the custom of *Rumney-Marsh*, by which the distress may be sold; and here they are not without remedy, for

* [329]

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The King
by his
Serjeants

the Court may send their mandate to a justice of peace to issue a warrant for levying by distress.

1. Jo. 421.
1. Cr. 497.

* [330]

HOLT, *Chief Justice*. Where one intitles himself to a duty and remedy by prescription, he must set out his remedy wholly. Indeed if you prescribe to a duty, you may have debt for it without prescription, but you cannot distrain without it; and if you prescribe to duty and distress, you cannot, by virtue thereof, sell, without a prescription for selling too, because a prescription may be to distrain without selling. * But by your argument, MR. EYRES, the *certiorari* would defeat the whole proceeding and conviction; for though the conviction be confirmed, you would have it that the justices cannot give a warrant, the record being here; and if we cannot award execution, there is an end of the matter: but by necessary consequence of law, whensoever there is a particular jurisdiction erected, an appeal lies from it to this court; if there be no judgment below, there will be no need of a *certiorari* in this case; and if there be one, then shall one go: And we, you say, cannot award execution; surely that would make a failure of justice; and we have a power to confirm, as well as to reverse or quash; and if so, by necessary consequence we have a power to award execution of what we confirm; for below nothing can be done; because the record is here. To say, that, at this rate, the money may be levied in another county, is not the case before us; for here the process is into the county where the fact was committed; so you come too soon for that objection; but if *nulla bona* had been returned, and a *testatum* had issued, there then had been some colour for your objection. When a statute says money "shall be levied by distress," this is an execution, *Rast. Entr.* 175. "Levied by distress," is a special plea, and so is "*nil debet*." If a man has rent due to him, he has his election to bring debt, or to distrain; and if he bring debt after distraining, the defendant may plead "levied *per* distress," for by distraining he has determined his election for that time; for otherwise he might have two judgments, *viz.* "Return irreplevisable," and "Judgment in debt;" to avoid which he may in that case plead "levied by distress." But *quære*, if he had distrained, and the cattle died in pound, *PER MOY*. But distress in a leet of common right may be sold, because it is a court of record; otherwise of distresses in courts that are not of record. As to commissioners of sewers, that is a special power given them, and in consequence of that they may sell. And *Callis* takes great pains to prove that they are a court of record (a); and though some acts, that order things to be levied by distress, have also the words "and sale," yet no necessary inference can be made from that, for statutes very often express matters more plainly than they need, for greater caution.

NOTA NOE.

Plk 2. Co. 42.
b.

ET PER CURIAM, Here the process is regular, and the goods may be sold.

(a) See Pritchard v. Stephens, 6. Term Rep. 322.

NOTE

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NOTE further, *PER TOTAM CURIAM*, That if all the sum were levied to a small matter, yet the party for default thereof shall * undergo the corporal punishment too, viz. the pillory, and year's imprisonment. TAKING
SWEAR
[331]

The Vill of Shandrigamy *against* The Vill of Sholedam. Case 571.

HOLT, *Chief Justice*. Commission of sewers to defend the kingdom against the sea is very ancient, and even by special prescription in some cases; but sewers for melioration of land are by act of parliament. Commission of
sewers.
S. C. Holt, 643.

Anonymous.

Case 572.

HOLT, *Chief Justice*. "By" and "from" are synonymous words.

Anonymous.

Case 573.

HOLT, *Chief Justice*. Trespas may be joint or several, as the plaintiff pleases; though the fault be the same in respect to him; but is several as to the agents, because the act of one is not the act of the other. Trespas.

Anonymous.

Case 574.

WARD moved to quash an indictment against *A.* for that "asseruit magistratos civitat. de LICHFIELD fore societatem asinorum." It is not indubitable to call the magistrates of a city a society of asses.

FIRST EXCEPTION, That it was *magistratos*, there being no such word.

SECONDLY, That it was not a direct allegation that they actually were asses, but by a *fore*.

And **HOLT**, *Chief Justice*, said, that if they had not reputation enough to secure themselves from such an aspersion, he would be of the defendant's opinion too; and it was quashed.

1. Roll. Abr. 56.
1. Vent. 50. 258.
Cro. Jac. 59.
1. Sid. 67.
1. Lev. 52.
2. Salk. 695.
Palm. 27.
Stra. 1169.
2. Ld. Ray. 1396.

The King *against* Thomson.

Case 575.

THE DEFENDANT being of good reputation, and riding in the king's guards, was taken by the hundred for a robbery, on the fortieth day; and it being feared he should be too violently king's bench may order a trial at bar.—S. C. Holt, 702. 1. Stra. 52. 644. 2. Stra. 816. Sayer's Rep. 79. 1. Term Rep. 363. 367. Tidd's Pract. 555.

Z 3

prosecuted,

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prosecuted, that the hundred might discharge themselves by his conviction, A TRIAL AT BAR was moved for.

And by **HOLT, Chief Justice**, It has been used to grant trials at bar in like cases. But there being no bill found, he said they could make no rule; but if there had been a bill, he said then it might be removed by *certiorari*, &c.

And he said, there was one way to sue a special commission to find a bill, and even so there must be process, and fifteen days between its *teste* and return, and return to be on common day; and he said he knew one *Holt*, an attorney, who had narrowly escaped being hanged at *Cambridge* assizes, because he was like one *Ambrose Holland* a highwayman.

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Case 576.

• The King against The Town of Andover.

Mandamus cannot be joint.

S. C. Salk. 433.

S. C. Holt, 444.

Post. 349.

5. Mod. 70, 11.

1. Bl. Rep. 60.

FIVE of the members of the corporation being turned out, sued a joint *mandamus*; and afterwards had it quashed, upon their own motion, because they could not join, for that the wrong done to the one is no wrong to the other (a). PER CURIAM.

(a) *Butler v. Rows*, post. 349. *Rex v. Stra.* 578. *But. &c. Rex v. Lord v. Mayor of Kingston*, 8. Mod. 209. *Montacute*, 1. Black. Rep. 69.

Case 577.

Mason against Keeling.

A declaration in an action on the case, for an injury done by the defendant's dog, must state that he knew (a) the dog was of a mischievous nature, or had done mischief before; for stating that he was a mongrel mastiff *valde ferocem*, and *defecto cura*, supplied the want of *sciens*, &c. for it was said to be part of the excellency of the law of *England*, that it leaves no man without a remedy, that has suffered a wrong through the fault of another. It was agreed there were *damna absque injuria*, but that only was when it happens without the commission or omission of plaintiff, &c. is not sufficient.—S. C. 1. Ld. Ray. 606.

ACTION ON THE CASE; in which the plaintiff declared, that on the twentieth of *June*, in the eleventh of the king, the defendant *quendam canem molossum valde ferocem* did keep, and let him go loose unmuzzled *per publica compita*; so that *pro defectu cura* of the defendant, the plaintiff was bit and worried by the said dog, as he was peaceably going about his business in such a street. There was another count, in which it was laid, that the defendant knew the dog *ad mordend. assuet*. To the first count there was a demurrer, and to the second not guilty.

And it was strongly insisted, that the laying it to be *canem valde ferocem*, and suffered to go about the streets unmuzzled, and *pro defectu cura*, supplied the want of *sciens*, &c. for it was said to be part of the excellency of the law of *England*, that it leaves no man without a remedy, that has suffered a wrong through the fault of another. It was agreed there were *damna absque injuria*, but that only was when it happens without the commission or omission of

(a) See *Kinnion v. Davis*, Cro. Car. 487. *Bolton v. Banks*, Cro. Car. 254. *Baxendon v. Sharp*, 2. Salk. 662. *Jen-*

kins v. Turner, 1. Ld. Ray. 118. *Smith v. Pelah*, 2. Stra. 1264.

any,

any, but never when there is neglect in another, through which I am damned. And the rule of "*actus non est reus nisi mens sit rea*," holds only in capital offences; and therefore if an infant or a lunatic commit a trespass, they shall answer it in damages, and yet it cannot be said to be *scienter*. *Hule's Pl. Cor.* 53. "If one keep a beast used to strike, and it kill a man, it is holden by some to be even felony, but by others to be only a great misdemeanor;" and the neglect without knowledge, where damages ensue, subjects the party to action. A soldier at his exercise discharging his gun hurt another, though pleaded to be *involuntarius et per infortunium*, yet action lay (a); and the rule in *Chief Justice Jones* 205. is, that nothing but an unavoidable necessity shall excuse from repairing an injury to a third person through his default; and here was no necessity for the defendant's keeping ** canem valde feracem*, much less to let him go unmuzzled about the streets; and it is laid in the declaration, and confessed by the demurrer, to be *pro defectu debitæ curæ* of the defendant, and that it was *valde ferax*; and this opportunity is given by the defendant to such creature to do mischief; what then can there be more reasonable, than to repair the wrong? There is no default in the plaintiff, for he was going about his lawful occasion; and there is surely a great fault in the defendant to let such a fierce creature range the street of London unmuzzled. Nothing is more probable, than that such a dog as this let loose among a crowd of people will do mischief; and it would be needless to give notice of its being likely to do so, and like telling a man that fire would burn, or a tiger would do mischief; and this is within the same reason with an action for negligent keeping his fire, for that is *pro def. debit. custod. of fire*, and this *pro def. debit. curæ* of his dog; and the case of fire is a much harder one, for there is none but must trust his servant with fire, and the accidents are many. In *1. Vent.* 295. notice is taken of a case which happened before that time, and was this: A butcher let loose an ox, and it was laid, that for want of the due penning of his ox the plaintiff was hurt by it, and there the action lay for want of due penning of his ox; and this is for want of due care of his dog; and here is equal prospect of mischief in both cases. If a man have an unruly horse which breaks through his close or stable and does mischief, an action will lie for it; and it is hard that one should have a remedy for the least trespass done in his land, and none for a trespass done thus to his person by wounding or maiming. Suppose one keep several mastiffs, shall he be exempt from an action for mischief done by every one of them, till he knows that he has done a prior mischief that is, no care is to be taken to prevent the first mischief? This seems to be contrary to the policy of the law, which delights more in preventing than punishing; and the maxim is, *Præstat cautela quam medela*. It is objected, that if an action be countenanced upon this declaration, a lap-dog or spaniel shall not

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Dalt. c. 95.

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snap at a man, but an action shall be straight brought for it; and so it will introduce a multiplicity of actions, which the law abhors. But I answer, that there ought to be "*sciens, &c.*" or that which is tantamount, that it was *ferox*, as here, and then no inconvenience. * It is also objected, that the precedents are all "*sciens, &c.*" But I answer, that would be an aggravation of damages; and precedents imply only that it would be the sorer way so to do; but not that *sciens* is absolutely necessary. It is said, that it is necessary in case of an action for biting sheep, and therefore *a pari (a)*. See 20. Edw. 4. pl. 11. so per *Townsend*; but there it is not denied, but that if a dog of *A.* chase the sheep of *B.* into the fold of *C.* whereby an action is given to *C.* against *B.* that *B.* shall have an action against *A.* And there is no comparison between the biting of cattle and biting of a man, for the law has a greater regard to the life and safety of a man than of a beast; and everybody is presumed to know that a dog *valde ferox* will be apt to do mischief, if let loose in a street among a crowd of people. But it is also objected, that it may be punished by indictment; and I believe it may; and from thence I infer this action will lie by any that has a special damage, as in 1. Inst. 56. a. and it is a true maxim, "*Quod quisque debet ita uti suo, ut alteri non noceat.*"

RAYMOND *contra*. Some Books say, that the law takes notice of the nature of a mastiff, and that is, that he is tame and domestic, or conversant with man, and therefore an action does not lie for the biting of such a dog without a *sciens*. What is it then can distinguish this case from that? It is said that this was a mongrel cur *valde ferox*, and that letting loose in a highway is a public nuisance; and even in that they fail, for they only say that he let him loose *per compita*, and that does not necessarily signify a street or highway; for *Latin* authors use it for a court or yard before a man's door; nor do I know of any authority that it is a nuisance to let a dog go at large: And there is a diversity between an ox that ranges the field, far from the society of man, and a dog, which is *animal domesticum*, bred among them, and therefore cannot be presumed to be prone to mischief as the other. And they cannot say that it is the nature of dogs to be fierce; and to say that an averment of its being fierce will support an action, is to oppose the whole current of authorities, which all require *sciens*; and it might be fierce and the owner know nothing of it, for they do not aver he did know him to be fierce. And as to the rule of law, that no man's wrong should be left remediless, there are few rules without exceptions; and the cases of *Hobart* and *Jones* are not like this, for every-body knows that a gun charged, if it go off, is apt * to do mischief, but not so of a dog. And an indictment would not have laid here without a knowledge of the ill quality.

Dyer, 25. b.
39. a.

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GOULD, *Justice*. No doubt but in the case of sheep there ought to be a *sciens*, because that is an accidental quality, and not

(a) Vide 20. Edw. 4. pl. 11.

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in the nature of a dog. And as to property of a dog, the Books distinguish; for a man has a property in a dog that is a *masiiff* or *spaniel*; for the one is for the guard of his house, the other for his pleasure; but this here is a *mongrel*, and laid to be *valde ferocem*, and that must be an *innate* fierceness, and not accidental; and if a dog be *assuet*, to bite cows, and the master know it, that will not be sufficient knowledge to make him liable for his biting sheep. Besides, this case is distinguishable in respect of the place, for the law takes notice of highway, and is a security for passengers; and it would be dangerous to keep such dogs near the highway, where all sorts of people pass at all hours; and to maintain this issue, they must give a natural fierceness in evidence.

HOLT, *Chief Justice*. If it had been said, that the defendant knew the dog to be *ferox*, I should think it enough. The difference is between things in which the party has a valuable property, for he shall answer for all damages done by them; but of things in which he has no valuable property, if they are such as are naturally mischievous in their kind, he shall answer for hurt done by them without any notice; but if they are of a tame nature, there must be notice of the ill quality: and the law takes notice, that a dog is not of a fierce nature, but rather the contrary; and the presumption is against the plaintiff; for can it be imagined a man would keep a fierce dog in his family wittingly? If any beast in which I have a valuable property do damage in another's soil, in treading his grass, trespass will lie for it; but if my dog go into another man's soil, no action will lie. See the case of *Millan v. Hawtree* (a), that *scienter* is the *gist* of the action; and so is 1. *Cro.* where it was doubted whether the *scienter* should go to the keeping or quality; nor does it appear here but it was an accidental fierceness: or suppose it were an innate one to this dog particularly, and it had been given to the owner but an hour before, shall he take notice of all the qualities of his dog at his peril, or shall he have his action against the giver for bestowing him a naughty dog? In case a dog bites pigs, which almost all dogs will do, a *scienter* is necessary (b). And I do not doubt but if it be generally laid that a dog was used to bite *animalia*,* and the defendant knew of it, it will be enough to charge him for biting of sheep, &c.; and by *animalia* shall not be intended frogs or mice, but such in which the plaintiff has property.

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And judgment was given for the defendant by HOLT, *Chief Justice*, and TURTON, *Justice*; GOULD, *Justice*, *mutante opinionem suam* (c).

(a) 1. JONES, 131. Poph. 161. Latch, 13. 119.

(b) 1. Cro. 255.

(c) *Sed quare*; for in S. C. 1. Ld.

Ray. 608. it is said, the case was adjourned, and that afterwards the parties agreed, and therefore no judgment was given.

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Case 578.

Crouch's Case.

Soldier arrested must find common bail, and plead the statute in his discharge.

HALL, moved to have him discharged upon the late act of parliament for disbanding the army, whereby soldiers are exempted from suits for three years upon affidavits.

HOLT, Chief Justice. All we can do is to order common bail; but he must discharge himself of the action by pleading the act, &c.; and the plaintiff may traverse his allegations.

And so was the rule.

Case 579.

Anonymous.

Names of the two justices need not be specified.

PER CURIAM. FIRST, If an order be by two justices, and so said, their names need not be mentioned (a).

Appeal to the next sessions.

And, SECONDLY, The next quarter-sessions to which the appeal must be is the next after the party is grieved (b).

(a) Rev v. West, 6. Mod. 180. Bllings v. Prince, 2. Bl. Rep. 1017. 1. Const, 426.
(b) See 43. Elia. c. 2. l. 6. 17. Geo. 2. c. 38. Rex v. St. Giles, 11. Mod. 222. Rex v. Poor of Canterbury, 4. Burr.

2290. Rex v. Clood, 1. Const's P. L. 236. Rex v. Micklesfield, 1. Const's P. L. 239. Rex v. Atkins, 4. Term Rep. 12. and Const's P. L. 5 vol. 441, 442. 2 vol. 834, 835. 838.

Case 580.

Anonymous.

Construction of the statute against Gaming. Ante, 258.

HOLT, Chief Justice. If one lose one hundred pounds to one, and afterwards one hundred pounds to another, at one sitting, both debts are lawful, notwithstanding the statute. So if a man lose five hundred pounds ready money, and one hundred pounds upon tick, both are good. And if there be two sharpers, and one of them get one hundred pounds, and give over, and then another takes him up, who wins another hundred pounds, both are good; for as they were sharpers, he was a rake, and ought to learn wit by being bit; and they are distinct facts.

BUT NOTE, I have heard TREBY, Chief Justice of the Common Pleas, deliver a quite contrary opinion in the case where two win successively, because at that rate the statute, which ought to receive a favourable interpretation in suppression of vice and gaming, would be easily evaded (a).

(a) See ante, 258.

Case 581.

Anonymous.

Custom of the town of Dartmouth.

HOLT, Chief Justice. The custom of the town of Dartmouth is, that if one serve his time, and learn a trade there, he is not thereby free, but the Corporation have power to make whom they

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they please free. It is an extraordinary custom, but who can help it? ANONYMOUS.

Anonymous.

Case 582.

HOLT, Chief Justice. In granting a new trial we ought not altogether to rely on the certificate of the Judge who tried the cause, but upon the reason of the thing; and sometimes I would grant a new trial against the certificate of a Judge, if in my judgment and conscience the matter deserves a re-examination.

The Judge's report not to be entirely relied on in a motion for a new trial. Tidd's Pract. 599. 606.

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Case 583.

* Anonymous.

HOLT, Chief Justice. I never liked the exception of "*pro Outlawry.*" "*com.*" in outlawry, though it has been one before I was born; but surely the first that obtained it had good luck (a).

(a) See *Rex v. Wilkes*, 4 Burr. 2564. where all the cases on this point are collected, and *Rex v. Barrington*, 3 Term Rep. 300. where one of the learned Judges is of opinion with *HOLT, Chief Justice.*—See also 5. Term Rep. 204. and 4. Hawk. P. C. 7th edit. ch. 27. page 189.

The King against The Warden of the Fleet.

Case 584.

AT A TRIAL AT BAR of issues joined, in pleading on a *MONSTRANS DE DROIT in chancery*, to an inquisition returned there, finding several misdemeanors in **THE WARDEN** in the execution of his office, which office is found to be an antient office exercisable in *Middlesex*; whereby the said office, and the prison-house in *London*, which were found to be appendant to the office, were forfeited;

S. C. Holt, 133.

There were two issues, one upon the escapes, the other upon the appendancy in *London*.

A jury of *Middlesex* being come to the Bar,

THE COUNSEL of the defendant challenged **THE ARRAY**, and had it drawn up in parchment in *French*, and read by Counsel. The cause was, that the jury ought to come from *London*, where the house was, and not from *Middlesex*, and returned by the *London* sheriff, and not a *Middlesex* sheriff; and he concluded, "*et hoc paratus est verificare prout. cur. &c. et petit inde judicium per quod arraiam. cassetur.*"

IT WAS INSISTED ON, the inquisition was in the nature of an information, declaration, or indictment; and took notice, that the house of prison was in *London*, and that supposing the office be in *Middlesex*, yet that only made it like a common in one county appendant to a manor in another, in which case both counties ought to join; and if it be a good challenge to a jury that they are not indifferent, though of legal venue; *à fortiori* when they have

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have no legal capacity at all; and 3. *Cra.* 646. was quoted, where cattle distrained in one county, and drove into another, and adjudged, that the jury to try that fact should come from both counties: and though in truth *London* cannot join with another county, yet that ought to be suggested on THE ROLL; and the Court cannot otherwise take notice of it. Besides, if the *venire* be awarded into both the counties, and a *London* jury came to the Bar, and did not insist upon the privilege, the trial would be regular; but if they insist upon their privilege, then perhaps the Court, for necessity, may award a *venire facias* to *Middlesex* only. And it is no reason to say, that because we may have advantage of this in arrest of judgment, we may not offer it: * now; for though we waive what we may move in arrest of judgment, yet we may assign it after for error in a writ of error.

THE ATTORNEY-GENERAL *contra.* The cause of challenge to THE ARRAY is the want of indifference in the officer; and the reason why they may challenge THE PANEL is, because that cause doth not appear on record; and, therefore they have no other way to take advantage of it; and that too is the reason of challenge to the polls.

HOLT, *Chief Justice.* The matter of challenge ought not to be to the Court, as here you make it; for you say, We have awarded a writ to a wrong officer, for the array is rightly made according to the writ. If the panel were returned by a sheriff, being a party concerned, or being a member of a body politic concerned, it would be a good cause of challenge; but we do not take notice upon the awarding the *venire facias* of any such thing, if we are not apprised of it by suggestion of party; and the want of a proper *venue* was never yet a challenge to THE ARRAY. If he were akin to either party, or interested, or not qualified by law to make a return, or had made it at the request of either party, or if the cause did concern the corporation of *London*, the *venire* ought to go to the coroner at first; but if you insist upon it, you must demur for the king, and they join in demurrer; then all appearing to us on record, we may give judgment immediately, or take time to consider.

And a demurrer was ordered to be drawn instantly, and a joinder in demurrer,

And the challenge over-ruled.

And HOLT, *Chief Justice*, said, It had been proper for them to move to quash the *venire facias* before; but now the jury was at the Bar.

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To prove the escape here, a witness, who really had been a prisoner, and voluntarily suffered to escape, was produced (a).

A prisoner who had given bond to be a true prisoner admitted witness to prove that he was suffered voluntarily to escape.
S. C. post.

To whose being a witness it was objected, that he had given a bond for his being a true prisoner, which he had forfeited by escaping; and besides, he had been retaken. Now by his evidence he would make this a bond of ease and favour, and the retaking a false imprisonment; for if the defendant be convicted upon his evidence, and after debt be brought by him on the bond, the conviction will be evidence to make it void, as taken for ease and favour: and in an action of false imprisonment for retaking, the conviction will be likewise evidence: and it was compared to an information for usurious contract, even in the king's name, the party to the contract shall not be a witness, if the debt be not paid (b). * So in information of perjury, neither party whose title was supported or invalidated by the oath is a witness; for if there naturally do follow from his evidence, if believed, any consequential advantage to himself, he is no witness; and the cases of *The King v. Tipping* (c) and *The King v. Hobby* (d) were quoted in the case of the perjury.

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It was answered and resolved by the Court,

FIRST, That if this were a bond for true imprisonment it would be good; but if for ease and favour void, and an escape.

SECONDLY, That a conviction here could be no evidence against the warden upon debt on the bond, nor for the prisoner in false imprisonment against the warden, because it would not be between the same parties; for conviction at the suit of the king for battery, &c. cannot be given in evidence in an action of trespass for the same battery, nor *vice versa*: the like law of an usurious contract.

Conviction of battery at the suit of the king cannot be given in evidence in trespass on the same battery.

THIRDLY, That no record of conviction or verdict can be given in evidence, but such whereof the benefit may be mutual, viz. where the defendant as well as the plaintiff might have made use of it, bring it into court, and give it in evidence, in case it did for him. So if the record had been for the plaintiff's advantage, and that they could not give it in evidence, the defendant should not give it in evidence for that very reason: and this was resolved at another trial at bar before this Term, between *Sherwin and Sir Walter Clargus* (e), where a verdict between the *Earls of Bath and Mountague*, upon the very same point and title now in question, viz. the legitimacy of *Christopher, Duke of Albemarle*, was denied for evidence.

No record of conviction or verdict can be given in evidence but such as both parties might have produced.

(a) That the party escaping may be a witness to prove a voluntary escape, see *Rex v. Ford*, 2. Salk. 690.

(b) See *Hard. 331.* 1. Salk. 285. *Abrahams Qui Tam v. Bunn*, 4. Burr. 2251. *Walton v. Shelley*, 1. Term Rep. 296. *Masters Qui Tam v. Drayton*, 2. Term Rep. 496. and 2. Hawk.

P. C. 7th edit. ch. 32. page 386, 387.

(c) *Hard. 331.* and see *Rex v. Eden*, Sittings after Hilary Term, 34. Geo. 3. *Espinasse's Cases Nisi Prius*, 97.

(d) 2. Keb. 845.

(e) *Rost. 343.*

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But HOLT, *Chief Justice*, said, he was of opinion against his Brothers some years before, in the case of one *Holford*, that anything an attorney knew, otherwise than *quatenus* an attorney, he ought to declare: but his Brothers held, that an attorney ought not upon any account to be received to reveal his client's secrets (a).

And HOLT, *Chief Justice*, said, If a client bring a forged deed to Counsel, the Counsel ought to prosecute him; and that he had known such a thing done.

A person may be burnt in the hand twice. HOLT, *Chief Justice*, upon occasion of a witness that was burned in the hand said, that one might be burned in the hand twice; as suppose the record of the first conviction be mislaid, and so not produced (b).

King's prison. NOTE, *Per* HOLT, *Chief Justice*, The king may have a prison in another man's house.

Burning in the hand does not impeach his credit, unless it be for a crime that affects it. Ante, p. 72. And in respect to a person who had been burnt in the hand, if it were for *manslaughter*, and afterwards pardoned, it were no objection to his credit; for it was an accident which did not denote an ill habit of mind; but *secus* if it were for *stealing*, for that would be a great objection to his credit, even after pardon (c); but the record of conviction ought to be produced, which here they had not (d).

The house of the warden of the Fleet prison is appendant to his office. THE COUNSEL for the defendant at last insisted on this, that the house of THE FLEET was not appendant to the office, as the house of the Rolls is to the office of the Master of the Rolls; first, because they pass by two distinct grants; secondly, * that, if ever it was appendant, it was made disappendant by letters patent in

• [342] King Charles the Second's time, whereby *Caroon House*, in Surrey, was given to the warden, and licence to sell the *Fleet House*.

But it was answered and resolved, FIRST, That there was the constant reputation of its having been appendant once, and that reputation continues still. SECONDLY, That the granting a new house to the warden might indeed make that house appendant to the office, but not disannex any; and, LASTLY, That the licence to sell the house did work nothing till execution, which they had not shewed.

And both issues were found against the defendant.

(a) Neither Counsel nor attorneys are permitted to reveal the secrets of their clients; but this is confined to those facts only which have been communicated to them in the course of business. Bull. N. P. 284. 11. St. Tr. 243. Doe v. Andrews, Cowp. 845. Rex v. Watkinson, 2. Stra. 1122. Rex v. Dixon, 7. Burr. 1087. Cobden v. Kendrick,

4. Term Rep. 431. Wilson v. Rastal, 4. Term Rep. 753.—See also 4. Hawk. P. C. ch. 46. s. 84. to 93.

(b) NOTE, This was Captain Coflack's Case. See Bendloe's Rep. 172.

(c) See *Ld. Ray*. 370. 380. *Stiles*, 388. 5. Mod. 15. *Hob*. 81. and 4. Hawk. P. C. 7th edit. ch. 46. s. 108.

(d)

Anonymous

Anonymous (a).

Cafe 585.

ONE was indicted for a nuisance for keeping several barrels of gunpowder in a house in *Brentford Town*, sometimes two days, sometimes a week, till he could conveniently send them to *London*.

Indictment for a nuisance in keeping gunpowder must shew probable danger.

HOLT, *Chief Justice*, resolved,

FIRST, That to support this indictment there must be apparent danger, or mischief already done.

SECONDLY, Though it had been done for fifty or sixty years, yet if it be a nuisance, time will not make it lawful.

Time will not legalize a nuisance.

THIRDLY, If at the time of setting up this house in which the gunpowder was kept, there had been no houses near enough to be prejudiced by it, but some were built since, it would be at the peril of the builder.

A pre-existing nuisance not indictable.

Cro. Eliz. 118.

Salk. 459.

3. Bl. Com. 217.

FOURTHLY, Though gunpowder be a necessary thing, and for defence of the kingdom, yet if it be kept in such a place (b) as it is dangerous to the inhabitants or passengers, it will be a nuisance.

Gunpowder not to be kept in inhabited places.

(a) This case was at *Nisi Prius*, before
HOLT, *Chief Justice*.

(b) See the statutes 11. Geo. 3. c. 35.
and 12. Geo. 3. c. 81.

Anonymous.

Cafe 586.

A MAN devised a legacy out of his land, and died, leaving sufficient assets for the payment of all his debts and legacies.

A legacy to be paid out of land is a charge on the real, and not on the personal, estate of the testator.

HOLT, *Chief Justice*. That legacy ought to be paid out of the land; for it is a charge on the land, and not on goods.

Ante, 276.

Though COWPER, *King's Counsel*, said, that in chancery, if it be not expressed that the legacy should be paid out of land, and not out of goods, if there be sufficient assets, they will charge them in case of inheritance.

1. Fonth. Eq. 414.

To which HOLT, *Chief Justice*, answered, If chancery be meddling with wills, they ought to go according to law.

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In this case a probate * of the will was given in evidence, it being of fifteen years standing, and the witnesses being three, and dead: positive proof was made of the death of two of them, and circumstantial proof of that of the third.

Probate of a will admitted in evidence to prove a legacy.

Esplanasse Dig.

761. Bull. N. P. 245.

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Cafe 587.

Anonymous (a).

Before bill of review granted the decree to be executed.

IT was agreed BY THE COURT and THE BAR, that the course of the Court is, before any *bill of review* is granted the former decree ought to be executed, if the cause of the bill of review be not such as extinguishes the whole right and foundation of the decree, as a release; and that it is a good plea in bar of a bill of review, that the former decree is not executed. And it was said, that though bills of review be in nature of a writ of error, yet it is not favoured in equity; for upon writ of error (and that only in some particular cases) one need only give bail to pay principal and costs; but in bill of review the decree ought to be actually complied with; and besides, there ought to be a security for costs: but a case of *Palmer v. Denby* (b) was cited, where in the case of an executor it was granted, without execution of decree.

Privilege.

NOTE, It was also agreed, that if a parliament-man sue one at law, he may bring him, without breach of privilege, into equity, to discover matter necessary for his defence at law. *Quere.*

(a) This case was in the court of chancery.

(b) 1 Eq. Abr. 219. 261. Prec. Chan. 137. 2. Eq. Abr. 383. 386.

Cafe 588.

Sir Walter Clarges against Sherwin.

What is not evidence for one not to be evidence for the other. Ante, 339.

AT A TRIAL AT BAR, in ejectment, of lands in *Yorkshire*, part of the *Duke of Albemarle's* estate, wherein the legitimacy of *Duke Christopher* was the only question, it was ruled by THE COURT, that a former verdict between other parties, concerning other lands depending upon the same question and title, could not be read in evidence; for if it were in affirmance of the plaintiff's title, they could not read it, as being between other parties; and what would not be evidence for one shall not be for the other.

Postea, 346.

But notwithstanding the verdict was read, to let them in to give evidence that a witness produced by the plaintiff had sworn now directly contrary to what he had sworn at the trial.

MICHAELMAS

MICHAELMAS TERM,

The Eleventh of William the Third,

A T

Nisi Prius,

BEFORE

Sir John Holt, Knt. Chief Justice.

* Anonymous.

* [344]

Case 589.

AN ACTION OF SLANDER, in which the plaintiff set out, that he was a PAWNBROKER by trade, and that the defendant said these words of him, "Thou art a broken fellow;" and laid and proved loss of customers, viz. that some who were coming to pawn goods with him forbore coming, and others took away theirs by occasion of the words.

The character of a pawnbroker may be injured by slandering his solvency in trade.

Vide Keyl. Cr. Cases 50. seems cont.

HOLT, Chief Justice. The trade of a broker is an honest lawful trade, though it lies under suspicions; for it is lawful to buy old goods, and sell them again, and so to lend out money upon pledge; but a broker ought to be very cautious in buying, for fear of buying stolen goods; yet if he should buy stolen goods, not knowing them to be such, it is no crime (a).

AND upon points arising upon this case HE said, that one might take a warrant to search a suspicious house, upon a felony committed (b); but it is at his peril to execute it in due time, and at suspected houses only (c); and though a constable may, by virtue of such warrant, search the house, and all other things that his warrant authorises him to do, yet if he go beyond his warrant, by which anybody is damaged, he is answerable for it (d).

A search warrant may issue on suspicion of felony.

(a) But by 1. Jac. 1. c. 21. "The sale of any goods wrongfully taken to any pawnbroker in London, or within two miles thereof, shall not alter the property." 2. Bl. Com. 448, 449.
(b) 2. Inst. 46. 52.—See also Samuel v. Payne, Dougl. 345. Ledwick v. Catchpole. Cald. 271.
(c) Hale P. C. 46. 4. Hawk. P. C. ch. 13. s. 16, &c.
(d) See the case of General Warrant, 10. St. Tr. 426. 4. Hawk. P. C. ch. 13. s. 10.

Michaelmas Term, 11. Will. 3. At Nisi Prius.

Case 590.

Anonymous.

If a captain of a ship refuse to deliver a sailor his clothes, &c. it is a conversion. **THE CASE** was : A captain contracted with seamen to go on a voyage, and after he had got them on board he would not pay them according to agreement ; upon which they demanded their goods, which he refused, if they did not stay till he had searched for them, which he refused to do then ; and this was held good evidence of a conversion.

Vide diversity,
1. Sid. 264.
1. Lev. 282.
1. Mod. 31.

HOLT, Chief Justice. In trover, the plaintiff ought to prove property of goods in him (a). And at least a demand and refusal ; and if there be several parcels, the orderly way to give evidence is to make an inventory of them, and prove the property of goods mentioned in it, and demand and refusal of them.

(a) See *Colston v. Woolston*, Bull. in the court of king's bench in Easter term N. P. 35. *Power v. Wells*, Cowp. 819. Trinity Term 1796. and the case of *Gordon v. Harpur*, argued

Case 591.

Anonymous.

The property of goods is in the person who, as purchaser, pays the money for them. **HOLT, Chief Justice.** A son employed his father to buy a frame for him ; the father agreed for it in his own name, and paid part of the money down, and gave a note for the rest. By the payment of the money, and giving the note, the property of the frame was immediately vested in the father ; and though the bill of sale, which was not made till a month after, was made to the son, the property, which was * already altered and vested in the father, could not be thereby divested and lodged in the son ; but if the bill of sale had been made to the son at the time of sale, it would have vested the property in the son : and an earnest does not alter the property, but only binds the bargain ; and property remains in the vendor till payment of the money or delivery of the goods (a).

* [345]

(a) See the statute 29. Car. 2. c. 3. 1. Com. Dig. 3d edit. 413. 2. Bl. Com. Langford v. The Administratrix of Tiler, 447, 448. 1. Salk. 113. 5. C. 6. M.d. 162. 329.

Case 592.

Anonymous.

The first indorser may bring an action on a bill of exchange, by striking out the other indorsers names. **AN INDEBITATUS ASSUMPSIT** upon a bill of exchange by *Domingo Franca*. It appeared upon the declaration, that there were several indorsements, and the action was brought by the first indorser, who struck off the several indorsements, and brought action for non-payment. The bill specified, "value received of the plaintiff."

HOLT, Chief Justice. If the action had been upon the custom, in this case the way had been for the plaintiff to get the last indorsee to indorse it to him, for him to bring an action as indorsee : but this action, he said, well lay, for the bill was given as a security for money, and without doubt it was a debt.

And

Michaelmas Term, 11. Wiil. 3. At Nifi Prius.

And here the plaintiff, to shew A PROTEST, produced an instrument, attested by a notary-public. A protest needs no other proof but the attestation of a notary public.

And though it was insisted on, that he should prove this instrument, or at least give some account how he came by it, Kyd on Bills, 136.

HOLT, *Chief Justice*, ruled it not to be necessary, for that, he said, would destroy commerce, and public transactions of this nature.

AND HE SAID, a bill of exchange might be accepted by parol, though the usual way be to do it by writing (a). A parol acceptance is good.

AND THAT, if a bill be drawn upon two, and one of them accepts it, it is an acceptance of both (b). Acceptance by one partner binds the rest.

THEN IT WAS URGED, that the declaration shews a protest for want of payment, when it was in truth for want of acceptance, as appeared by the protest. Protest for non-payment includes protest for non-acceptance.

YET IT WAS RULED well, because this was not upon the custom, but a plain debt; and one might bring debt or *indebitatus assumpsit* upon a bill of exchange, because it is in the nature of a security. Kyd on Bills, 136. 193.

(a) *Lumley v. Palmer*, 2. Stra. 1000. 1. Ld. Ray. 175. Kyd on Bills, 31.—Kyd on Bills, 70.—See also *Powell v. Monier*, 1 Atk. 612. But see *Kilgour v. Finlyson*, 1. H. Bl. Rep. 155.

(b) 1. Salk. 126. Gilb L. E. 117.

Anonymous.

Cafe 593.

THE ORIGINAL DRAWER was offered as an evidence in an action upon a bill of exchange, to prove that he did not draw the bill. Drawer of a bill of exchange no witness to prove he did not draw it.

But was denied, because at last the burden must fall upon him; but the party gave him a release in court, and that was sufficient. Ante;

1. Ld. Ray. 444. Stra. 946. 3 Burr. 1354. 1. Black. Rep. 390.

* ——— against Harrison.

* [346]

Cafe 594.

A SERVANT had power to draw bills of exchange in his master's name, and afterwards is turned out of the service. A master who has authorised a servant to act is bound by acts done subsequent to his discharge, unless notice be given.

HOLT, *Chief Justice*. If he draw a bill in so little time after that the world cannot take notice of his being out of service, or if he were a long time out of his service, but that kept so secret that the world cannot take notice of it, the bill in those cases shall bind the master. 3. Bac. Abr. 560.

Michaelmas Term, 11. Will. 3. At Nisi Prius.

Case 595.

Anonymous.

Witness.

A AND **B**. two brothers; the goods of **B**. in his house were taken in execution; **A**. supposing them to be his goods, brings trover; and **B**. and his wife were denied to be witnesses to prove them the goods of **A**. though it were to divest the property out of themselves, because it favoured of fraud. *Quære.*

Case 596.

Anonymous.

Executor taking a bond from a debtor makes it assets.

1. Salk. 79.

IN DEBT by husband and wife against an executor, who pleaded *plene administravit*. Upon issue it was proved, that the executor had discharged a debtor of the intestate out of *Ludgate*, taking a bond from him for the debt; and it appeared that he was so extremely poor that he was downright starving; yet the debt was judged *assets* in the executor's hands.

Assets presumed, if inventory not given in.

Wife continues suit commenced by her and her husband, when recovered shall not be assets.

Besides, the executor had not an inventory; wherefore it was said they ought to intend assets.

And here **HOLT**, *Chief Justice*, ruled,

FIRST, That if a husband and wife jointly sue for a debt due to the wife before marriage, and the husband dies, and the wife continues the suit, the money, when recovered, shall not be assets to the executor of the husband.

1. Chan. Ca. 189. *cor.*

1. Chan. Ca. 182.

Husband may sue alone for his wife's portion.

Prec. in Chan. 63. Ca.

And that husband alone might bring debt for a portion promised to him with the wife; and though land had been settled by the husband upon the wife in consideration of her fortune, of which this debt was part, yet he having not recovered it during coverture, the wife should recover it to her own use.

An execution cannot be given in evidence without shewing the judgment.

Ant., 343. *failure.*

And though it was pretended that there was a recovery in the husband's time, and that they would prove by the sheriff who had a writ of execution, yet they having not the judgment on which the execution was, it was ruled they could not give that in evidence.

* [347]

Case 597.

* Normand *against* Mills.

A constable is not justified by a warrant executed after the justice who granted it is out of the commission.

1. Ld. Ray. 740.

FALSE IMPRISONMENT against a constable for executing a warrant of *Sir James Butler* after he was out of the commission of the peace.

HOLT, *Chief Justice*. The constable at his peril is to take notice that his warrant be by one in commission; but all the favour we can do him is, since it was a warrant executed a day or two after *Sir James* was out of the commission, that if he has behaved himself honestly and civilly, to be mild to him: and he said, the constable ought to shew the justice of peace's commission, though heretofore it were held common reputation would be enough; and here the constable, coming out of his own parish to execute the warrant, betrays his officiousness.

E A S T E R

The Twelfth of William the Third,

IN

Sir John Holt, Knt. Chief Justice.

Sir John Turton, Knt.

Sir Henry Gould, Knt.

Sir Lyttleton Powys, Knt.

} *Justices.*

Sir Thomas Trevor, Knt. Attorney General.

John Hawles, *Esq.* Solicitor General.

Earl of Peterborough *against* Sadler.

Cafe 598.

IN A CASE between the *Earl of Peterborough* and *Sadler* his farmer, a trial being concerning the value of improvement made by *Sadler*, a jury of farmers having given two hundred pounds damages, which was thought excessive, and therefore a new trial granted, and a jury of gentlemen ordered, who only gave forty pounds : whereupon a new trial now was moved for, for *Sadler*, because of smallness of damages :

HOLT, *Chief Justice*, said, that one * must not always conclude * [348]
because the Court grants a new trial, that they are satisfied that the
first verdict was bad, but it is often because the thing may require a
re-examination.

And a new trial was granted.

Sir ——— Cecil *against* Others of the Town of Nottingham. Case 599.

THE QUESTION was, Whether serving an attachment for contempt on Sunday were within the statute 29. Car. 2. c. 7. f. 6. the words of which are, "That no person or persons upon the
A a 4 " Lord's Sunday.

1. Hawk. 19.

Easter Term, 12. Will. 3. In B. R.

899 ——— “ Lord’s Day shall serve or execute any writ, process, warrant, order, judgment, or decree, except in cases of treason, felony, or breach of the peace.”

CECIL
against
OTHERS OF
THE TOWN OF
NOTTING-
HAM.

HOLT, *Chief Justice*. Suppose it were a warrant to take for forgery, perjury, &c. shall it not be served on *Sunday*? And shall not any process at the king’s suit be served on *Sunday*? Surely the Lord’s Day ought not to be a sanctuary for malefactors; and this here partakes of the nature of process upon an indictment.

But CURIA *advizare vult* (a).

Interrogatories
on an attach-
ment.

HOLT, *Chief Justice*. Upon an attachment one is only to answer interrogatories; and if he can swear off the contempt, he is discharged.

Ignorance of
law.

HOLT, *Chief Justice*. Ignorance of the law cannot be pleaded in justification of an act against law, but may be offered in mitigation.

(a) The arrest of a petitioner to the court of chancery, under a warrant of the court, for a contempt in disobeying an order, has been held well executed on a *Sunday*, *Ex parte* Whitchurch, 1. Atk. 55; but a person convicted on a penal statute cannot be apprehended on a *Sunday* for non payment of the forfeiture, *Rex v. Myers*, 1. Term Rep. 265. in which

it is said, that *Cecil’s Case*, as above reported, might have been good law at the time it passed, for then the Court looked only to the contempt; but that it has been settled of late years, that an attachment for non-performance of an award is only in the nature of a civil execution, 1. Term Rep. 266.—See also *Rex v. Stokes*, Cowp. 136.

Case 600.

Anonymous.

The attachment which entitles the party to damages is on the *pluries*; that which punishes the contempt is on the *alias*.
Ante, 164.

HAWLES, *Solicitor General*, moved for an attachment upon the *alias mandamus*.

HOLT, *Chief Justice*, said, It hath been sometimes granted in the like case, but not frequently. And there were two sorts of attachments upon a mandatory writ; the one intitles the party to his action for damages, and that must be upon the *pluries* (a); and the other punishes the contempt, which may be on the *alias*. So is the attachment upon a prohibition, which is the case in *Croke*; and here they took a *pluries*, and no attachment.

(a) 1. Cro. 559.

Case 601.

The King against Bell.

Recognizance
discharged on
indictment be-
ing found.

BELL was bound by recognizance to appear here for printing a seditious libel concerning the *Scots* colony at *Darien*; and it appearing an indictment had been found against him at THE OLD BAILEY, which he had traversed, and was to answer there, his attendance was discharged here.

Anonymous.

Anonymous.

Cafe 602.

THOUGH THE PLAINTIFF, after judgment, does own satisfaction by parol, yet we never do compel him to do it by deed, if * the defendant does not release errors ; for if the judgment were afterward reversed, the plaintiff would be concluded.

Plaintiff not to confess satisfaction unless the defendant releases errors.

Stout *against* Marlon and Cowper.

Cafe 603.

ON THE DAY on which an appeal was returnable it was moved, that the appellant should be demanded.

On writ returned, the appellant may be demanded, and on his not coming the appellee will be discharged.

CURIA. There is no writ returned, so no appeal pending ; and the sheriff has all this day, sitting the Court, to make a return. **BUT IT WAS AGREED**, that if the writ were returned, they might come and have the appellant demanded ; and if he did not come, they should be discharged.

And a motion for the appellant, that the sheriff should return his writ, was denied, there being no affidavit that it was delivered to the sheriff.

Sprag *against* Richardson.

Cafe 604.

ARULE OF COURT was for the sheriff to shew cause, upon his personal attendance, why he should not pay money levied on to execution.

Sheriff ordered to pay money levied on a *facias*.

And upon affidavit of service, **NORTHEY** moved for a new rule absolutely to pay the money, let the Court deal with him as they pleased.

But the affidavit being defective, they were ordered to amend it.

Butler *against* Rewes.

Cafe 605.

ACTION for a false return to a *mandamus* was brought by two churchwardens (a) ; and moved in arrest of judgment that it could not be, because the fees of the one were not the fees of the other, but several.

Two cannot join in an action for a false return to *mandamus*. Ante, 332.

CURIA *advizare vult*.

(a) See *Rex v. Town of Andover*, ante, 332.

The King *against* Hays.

Cafe 606.

AN ORDER OF SESSIONS was made for the discharging an apprentice from his master upon the statute of 5. *Eliz.* c. 4. and two exceptions taken to it.

The sessions may make an original order for the discharge of

FIRST, an apprentice.

Easter Term, 12. Will. 3. In B. R.

THE KING
against
HAYL

FIRST, That the first proceeding was at the quarter sessions, whereas it ought to have begun by complaint to two justices; and for this the case of *Hawthornth v. Hillary* (a) was cited; to which was opposed *I. Vent.* 174.

SECOND EXCEPTION, That it appeared the master was not present (b).

* [350] * HOLT, Chief Justice, was then strongly against the order upon the first exception, for that they ought to have followed the method set them by the statute; for the Legislature thought convenient that endeavours of justices of peace should be first used; and if the party of whom complaint was had not complied with the justice's proposal, then that he should give a bond to appear at sessions, and that is as it were by appeal: but if the party had promised to obey the justice of peace's orders, but afterwards would not stand to them, the only way was to complain *de novo*, &c. and the justice to attach him, and bind him to the sessions.

BUT NOTE, In *Trinity Term* 1701, in the cases of *The King v. Johnson* (c) and *The King v. Fenwick* (d), it was unanimously resolved, the order made at sessions at the first step was good; and HOLT, Chief Justice, said, he was brought to that resolution rather from the necessity of the thing, the practice being all so, than any reason he saw for it (e).

(a) 1. Saund. 314. S. C. 1. Mod. 2.

(c) Salk. 68. Post. 553.

(b) See *Dutton's Case*, 2. Salk. 491.

(d) See post. 553. *notis.*

that the sessions may discharge an apprentice although the matter do not appear.

(e) See *Rex v. Dillon*, post. 498 *Rex v. Davis*, 2. Stra. 704. *Rex v. Heafeman*, Ann Rep. 101. S. C. Stra 1014. and Mr. Confl's P. L. 1 vol. 513. to 517.

—But see *Reg. v. Rutter*, 1. Confl. P. L. 513. *Rex v. Gill*, 1. Stra. 143.

Case 607.

Cremer against Wickett.

IN ASSAULT AND BATTERY, the defendant pleaded in abatement another action for the same cause pending in this court; to which "*nul tiel record*" was replied, and "*habetur tale record*" rejoined; and the plaintiff signed his judgment for want of a plea.

And a rule granted to shew cause why a writ of enquiry should not be executed.

NORTHY shewed for cause, that a record of this court being pleaded, and "*nul tiel record*" replied, there was a full issue joined; and therefore by the course of the Court the plaintiff could not sign his judgment till he had paid the defendant's attorney for entering his plea. *Vide Dy.* 228. *Co. Ent.* 138.

THE WHOLE QUESTION was, Whether, after a record of the same court pleaded, it were proper to plead *nul tiel record*. and to the plaintiff cannot sign final judgment by *nul tiel record*, for want of the defendant's paying for the plea. — S. C. *Carth.* 517. S. C. 1. *Ld. Ray.* 550. 2. *Will.* 113. 367.

join

Easter Term, 12. Will. 3. In B. R.

join issue upon it, or that the defendant might demur to the replication?

CLEARER
against
WICKETT.

NORTHEY urged, that if a record of the same court be pleaded, the plaintiff may immediately crave *oyer* of it; and if the defendant do not grant it, or produce the record, there is an end of the plea.

Quod fuit concessum PER CUR. Vide 5. Hen. 7. 24.

But if it be a record of another court, the way is to reply *nul tiel record*. and then day is given to bring it in: but that it was a doubt in antient Books, whether *nul tiel record*. might be pleaded to a record of the same court; and that it might, he quoted the case of *Buck v. Pierce* (a), where the question was upon * such a plea * [351] pleaded, and day given to bring in the record, and it not produced, whether that were a failure. Vide 256. H. 6. Rot. 424. 1. Inst. 157.

And per HOLT, Chief Justice, It has obtained, that when a record is pleaded in the same court, they may reply *nul tiel record*.; but the proper way is to crave *oyer*, and then a day is given. And he said, a record might be pleaded by way of inducement, which is not traversable; and to it *nul tiel record*. is no plea: so if record of an inferior court be pleaded it is not traversable, because not a good plea.

Vide 1. Saund.
97, 98, 99.
Ante, 215. that
he might.

And the case being again moved, it was held PER CUR. that the defendant ought not to rejoin and say, *habetur tale recordum*, for the entry upon pleading a record of this court is, "*quia Cur. domini reg. advisar. vult, &c. ideo dies datus est, &c.*" to produce the record; and if upon search the record be found, then the same is shewn in court, and thereupon judgment; or if the record be not found, then there is an entry of search, and no record found, and thereupon judgment of *respondeas ouster*. So there are two ways of replying when a record of the same court is pleaded, either to reply *nul tiel record*. as is done here, or to crave *oyer* of it; and they relied on the case in Dy. 228. And to what purpose should one join issue upon the being of a record of this Court when we have them all before us, and may presently know the matter? and the difference is between a record of this court and of another court.

Difference
where it is a re-
cord of the same
court and wher-
of another court.
Ante, 214, 215
267.

And judgment final being entered was set aside, because failure of record is not peremptory; and it being upon a doubt of practice shall not conclude.

(a) Mich. Term, 8. Will. 3.

— against Wats.

Case 608.

IN DEBT AGAINST BAIL the question was, Whether they should be admitted to surrender the principal, as they might upon a *scire facias* upon two *nibils* returned? and it seemed reasonable they should, and made a rule of court.

In debt against
bail, principal
may be surren-
dered.

Anonymous.

Tidd's Pract.
46. §3.

Cafe 609.

Anonymous.

Scire facias on a wrong judgment set aside on motion. **S**CIRE FACIAS recited a judgment in the time of the king, which in truth was in the time of the king and queen, and so no judgment to warrant it; and judgment upon return of *nihil*.

CURIA. In strictness we ought to put them to *audita querela*; but we generally relieve them upon motion, and the judgment on the *scire facias* was set aside; and ordered, that the money levied by a *fieri facias* thereupon should be refunded.

* [352]

Cafe 610.

* Horn against Luines.

IN REPLEVIN, the defendant intitles *J. S.* to a rent-charge of one hundred pounds a-year in the place WHERE: and makes conscience as his servant for a year's rent arrear at such a time.

The plaintiff replies, that as to fifty pounds, part of the said rent supposed to be due at such a time, *de injuria sua, &c.* **ABSQUE HOC**, that there was *riens arriere, et hoc parat est verificare*; and as to the other fifty pounds, a readiness for payment of it at the day of payment; and that he always was, and still is, ready to pay it, *et profert in cur. et petit judicium de damnis*.

The plaintiff by his bailiff takes the money out of court, and traverses his being always ready, &c. and demurs to the first plea specially, because that making a complete general issue, he ought to have concluded *to the country*, and not with an *averment*; for it was agreed, that if they could not plead it without an inducement he must have concluded with a traverse; but this was no more than

"*riens arriere*," and therefore pleadable as such, and then he ought to conclude *to the country*; and that not concluding *to the country* where one ought was fatal, was quoted 2. *Saund.* 188.

SECOND EXCEPTION, That the other part of the plea was bad, because he demands judgment *de damnis*; for if there be anything due to us, we have cause of distress, and then he can have no damages; for if I distrain for two things, and I have cause for the one and not for the other, if I justify for any one of them I shall have return for both. *Hob.* 133. But if I distrain two several distresses for two several causes, as suppose two horks, one for trespass and the other for rent, there justifying for one intitles me to a return for one only; and the plaintiff shall recover damages for the other.

ANOTHER POINT in this case was, Whether, after taking the money out of court, he could plead a demand, and refusal after, or traverse the tender, &c. for damages? and that he could not was quoted, *Cra. Jac.* 126. 21. *Edw.* 4. pl. 25. pl. 39. full in point. *1. Inst.* 107. a.

Contra

Easter Term, 12. Will. 3. In B. R.

Contra these precedents were urged, where, after money taken out, the plaintiff replied for damages; *Ayton*, "D. 31," 278. *Mich. Term*, 14. *Jac.* 1. *Roll* 1718. *Raft.* 159. *lib. pl.* 159. *Raft. tit.* "Mesne," 7.

How
against
Laines.

* OF THE OTHER SIDE it was answered, that the plaintiff could not receive it but as it was tendered; and that it was tendered in discharge of damages. * [353]

And that what amounts to the *general issue* may be pleaded with an *ABSQUE HOC*, they insisted upon the case in 3. *Leon* 239. *Kel.* 74.

PER CURIAM. When money upon a plea is taken out of court, the judgment is, "*eat inde quietus sine die*;" for when the defendant brings in the money, the plaintiff, by taking it out, agrees with the defendant's allegation. And they said, they knew no case where damages are only accessory; and the plaintiff by his own act bars himself from judgment for the principal, that he shall have judgment for the accessory. But in ejectment, where the term is expired during the plea, it is otherwise. And as to one half-year's rent, whereof he pleads a tender, if he had pleaded a tender right it had been a good plea, according to *Hob.* 207. for he could not distrain afterward without making a demand in case of rent charge or seck.

When money on a plea is taken out of Court, the judgment is *eat inde sine die.*
2. Cro. 126.

Then suppose the tender be well pleaded, the bringing the money into court is superfluous in case of an avowry; but in debt upon bill or bond, tender *et adhuc parat.* is the plea, and there it is necessary to bring the money into court to save damages. But the money is not demanded here, for it is a replevin for goods; and the question only is, Whether he had a right to distrain? for if he had not, there ought to be damages against him, and no return; if he had, he ought to have return of the distress.

Bringing money into court on tender of rent is superfluous in avowry, but in debt on bond is necessary to save damages.

But here there was no tender pleaded, but only *paratus fuit* on the land; for be the grantee present or absent, there ought to be an *obtulit* pleaded, and that he did not come to receive it. And if your plea be bad, as questionless it is, and you bring money into court, and their bailiff take it out, both your bringing it in, and their taking it out, is impertinent; and since your plea is bad, what he says after is not material; for here is a good avowry, and no good answer to it; for though he never did demand, yet if you never did tender he may distrain without any demand at all; and to make the distress tortious, you should have pleaded a tender; and therefore, though money be brought into court by you, and taken out by them, we ought to award a return. Take advantage of the money's being taken out as you can.

In tender of rent *obtulit* should be pleaded.
Vide 2 Cro. 14. Yelv. 38.

Then as to the traverse, that the distress was *de injuriâ suâ propria*, *ABSQUE HOC*, that there was *aliquid a retro*, the * question is, Whether it be well pleaded? It is the same as *riens arriere*, and *riens arriere* is the general issue in an avowry; for the lord justifies because there is so much rent behind, and the tenant pleads *riens* * [354]

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HORN
against
LIVING.

riens arriere, et de hoc, &c. which is the proper way ; and instead of this you come with a circumlocution of an inducement, and an *absque hoc* ; and this, though it be but form, yet it is legal form, and such as the law will have observed.

Where the general issue is specially pleaded, if colour be not given it is good cause for demurrer.

Vide 1. Vent.
101.
2. Cro. 14.
Yel. 38.

And where one pleads a *general issue* specially, without *giving colour*, it is good cause of demurrer ; and yet that is but form ; for if he had pleaded the general issue, he might have given the special matter in evidence ; but here your intent by this special plea was to have forced them to reply, by which you would inconvenience them ; for if you had pleaded the general issue, there had been an end of pleading." *Huish's Case* (a). An *audita querela* upon a defeasance of a recognizance ; and it was for payment of money at such a day ; and pleaded, that he was ready at the place, and tendered it, &c. : the plaintiff pleads, that he was at the place ready to receive, *ABSQUE HOC*, that the other was there to tender ; and held the plea was bad upon the reasons *supra*. So *obtulit* is absolutely necessary, and *paratus* not sufficient. Secondly, the bringing the money into court does not abate the writ. Thirdly, In replevin there needs no *proferit in cur.* because you do not demand the thing itself. Fourthly, *Riens arriere* is the general issue, and therefore to be pleaded and concluded so ; and though pleading it specially be but form, yet for avoiding prolixity in pleading it is bad on demurrer.

And *PER CURIAM*, The plaintiff had judgment on both pleas.

HOLT, *Chief Justice*, said, that it was not yet settled whether after return irreplevifable, if the party tender arrear to the bailiff, it be good to intitle him to action for detainer against principal ; though it be so settled in case of tender to principal in *Carpenter's Case* (b). And he said, that he was not satisfied with *Pilkenton's Case* (c) in that point ; for if bailiff may not distrain, nor receive money tendered, why shall his receipt abate a writ ?

Ante, 8. 152.
Note diversity.

NOTE, In this case, upon the point of pleading of tender, this diversity was taken by HOLT, *Chief Justice*, that tender at the day is no plea to a single bill, but only in bar of damages ; in which case you must plead it before imparlance, with a "*touts temps et uncore prist et proferit, &c.* ;" but tender at the time is a good plea to a penal bond in bar, because it saves the forfeiture, and therefore may be after imparlance (d).

(a) 3. Cro. 754.
(b) 8. Co. 145. 2. Roll. Abr. 561.
(c) Cro. Eliz. 813. 5. Co. 76. Co. Ent. 662.
(d) *Sed vide* 1. Inst. 207. a. 21. Edw. 4. 25. pl. 39. This seems to hold only where the penal bond is for doing a col-

lateral thing, and not where it is for payment of money. But *vide* the case in Dyer, 300. a. that in case of a bond for payment of money he may plead tender *et uncore prist* after imparlance.—NOTE to the former edition.

* [355]
Case 611.

The King against Hatcher.

Information for putting wax to writs not being sealed.
S. C. 14. Viner, 411.

HATCHER, a Clerk in Chancery, was committed by my Lord Keeper for sending writs into the country with soft yellow wax upon them, without being sealed by the great seal, as if they had been actually sealed ; and this was said to be a very high misdemeanor.

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meanor, and next to counterfeiting the seal; and he was bound himself in one thousand pounds, and two more in five hundred pounds each, for his appearance, in order to an information.

THE KING
against
HATCHER.

Pullen against Purbeck.

Case 612.

AN *ELEGIT* was sued about eight years before, and a return of *an extent* thereupon filed then thus: "That the defendant was possessed of chattels to such a value, which he had taken in execution; that besides, the defendant was seised of a certain close called *A* of the yearly value of fifty pounds a-year; and of a close called *B* of the value of five pounds a-year; and of a third close of the value of fifty pounds a-year; and so found by the inquisition; and had no more lands or tenements at the time of the judgment, or at any time since; that he delivered to the plaintiff the said close of *A* and *C* to hold *tanquam liber. tenemen. &c.*"

All this being filed on record, the plaintiff never having entered by virtue of it, sues out this special *scire facias*, suggesting all this matter. To which the defendant demurred.

THIS CASE was argued several times by CHEATHAM for the defendant, and NORTHEY for the plaintiff, this Term (b).

For the plaintiff was quoted *Hob. 47.* that if execution be sued, and executed by *elegit* of lands not extendible by virtue of it, yet the execution shall not be thereby merely void; but if the party has any remedy, it must be by *audita querela*, 1. *Roll. Abr. 104.* And he said, that though it might be said that such execution be void in some Books, that is to be understood it may be avoided or voidable; and that ought to be before filing of the return; and he quoted 1. *Hen. 5. c. 5.* and 1. & 13. *Eliz.* where that word is to be so understood in an act of parliament; and relied on *Hale's*

opinion, 1. *Sid. 239.* that such *extent* of more than a moiety was * unavoidable, after return filed. 2. *Inst. 296.* that an *extent* once filed cannot be set aside, as it may before filing an examination, if the Court see occasion. 1. *Edw. 3 pl. 44. 49.* Bro. *Extent, 5.* Fitz. *Extent, 2.* 1. *Sid. 356.* 1. *Roll. Rep. 89.* 3. *Cro. 310.* A new *elegit* was granted, upon surmise of more lands than were extended; but if that had not been surmised upon return of the first, a second *elegit* would have been merely void. Vide 15. *Hen. 7. 15.* that after *elegit* the party cannot have a *capias* or *fieri facias*. Fitz. *Extent, 16.*

(a) But upon an *elegit* the sheriff is not bound to deliver a moiety of each particular tenement and farm, but only certain tenements, &c. making in value a moiety

of the whole. Den, Lessee of Taylor, v. 754. The Earl of Abingdon, Dougl. 472.

(b) See post. 366. a second argument.

If, to an *elegit*, the sheriff return that the defendant was seised of two farms, the one of forty pounds a-year, the other of sixty pounds a-year, and that he had delivered to the plaintiff the said farm of sixty pounds a-year, the execution is absolutely void, for the sheriff cannot deliver more than a moiety of the defendant's lands (a); and therefore the plaintiff may, in such case, sue out a fresh writ of execution.

* [356]
S. C. 1. Vent. 259.
S. C. 2. Salk. 563.
S. C. Carth. 453.
S. C. 1. Ld. Ray. 346. 718.
Cro. Jac. 12. 246.
1. Keb. 465.
1. Sid. 91.
1. Vent. 259.
Dalt. Sh. 135.
2. Bac. Ab. 349.
Dougl. 472.
Tidd's Pract.

To

PULLEN
against
PUTTECK.

If comtee enter before any return of execution, he is a good tenant, though the common way be to bring ejectment; yet if the plaintiff enter, he has a good title against every-body; till debt be satisfied; so they may enter and hold here, after this return; and if we had brought an *audita querela*, it would only avoid the surplussage.

If extent be avoided by *audita querela*, must account for mean profits.

Quod HOLT, Chief Justice, negavit; for he said, it would avoid all, and make him account for the mean profits.

In *Dawson v. Jefferson* (a), a *venire facias* to try an issue; the jury find more than was put in issue, and void only for surplussage, and a new *venire facias* shall not go; for where an authority is exceeded, all shall not be void, but only the excess; but where the sheriff has no authority at all, it is not so; as where he extends land of a stranger; and a new *elegit* they cannot have for lands only; and they have all his goods already, and no suggestion that he has any since. He concluded, that there was no judicial opinion against him; for 1. *Vent.* 295. was only a saying upon motion; and that 3. *Feb.* 313. was but the same case; and that none will dispute but the defendant may have an *audita querela* here; which shews the extent is not merely void.

• [359]

- 1. *Vent.* 259.
- 1. *Sid.* 91. 239.
- 1. *Brownl.* 96.
- 2. *Lev.* 160.

Anac, p. 356.
Postea, 364.

CHESHIRE *contra*. The first execution is void; for the *elegit* by the statute, is a new authority to the sheriff; which, * by rule of authorities, ought to be pursued strictly, or else what is done upon it is void; notwithstanding the favour the law gives to executions. If the sheriff had extended all the defendant's land, that had been merely void, because he had exceeded his authority; and that he does by extending anything more, as well as by extending all. 1. *Vent.* 259. *Office of Sheriff*, 135. 12. *Edw.* 4. 2. *Br. Elegit*, 14. Of two acres the sheriff may extend one; or of two manors one, if they be of equal value; but a void act is not capable of a *magis et minus*. An act of parliament, introductive of a new law in the affirmative, is negative of what is not expressed therein. *Plow.* 109. 113. 206. *Hob.* 298. So has the construction been made upon another branch, which impowers the sheriff to take all the party's goods and chattels, except *averia caruca*; and if he take them, trespass will lie against him. 2. *Inst.* 133. 395; 396. *Elegit* lies not against an infant, though there be no exception of infancy in the statute; because the privilege of infancy shall not be taken away by affirmative words: So if trespass lies for taking *averia caruca*, because of the exception of the statute, this being an affirmative law, &c. is the same as if there were an exception of a moiety. Where there is any matter *dehors* which may avoid the extent, that must be complained of before return filed, or by *audita querela*, because the fact may be controverted. But where it appears on record of the return filed, it is a *felo de fe*, and needs no more to shew it ill done; as if judgment were, that the sheriff should extend more than a moiety, it would

be ill. As for the case of *Ross v. Works* (a), there is no reason given for it; and a man may be ever cautious, and bring *audita querela* without necessity; vide *Hast. 66. Lit. Rep. 77.* to this purpose.

POLICE
against
POUNDS.

IT WAS OBJECTED, that we have accepted this extent, and have acquiesced for nine years. I ANSWER, That depends upon this, whether the extent be void or voidable; if only voidable, it is against me; if void, that must be absolutely void, or void or voidable at election; if void or voidable, our acceptance makes it good; if absolutely void, as I contend it is, no act or acceptance of ours can help it; as vide 1. *Inst. 300.* a thing may be made good by confirmation. If tenant in tail make a lease not warranted by the statute, it is void or voidable, at the election of the issue. But this is not an imperfect conveyance of an interest; but we say a void execution of a * process of law, which we can no more make good, than we can make a good one void. If no land be extended upon an *elegit*, it is only in nature of a *seire facias*; vide *Hob. ubi supra*; and if we are bound by acceptance of more than a moiety, they ought to be so too; for it were absurd we should be tied, and they loose; and by this argument, acceptance of the whole would be good. A deed indeed may be good against one, and void against another; good against one's self, and void as to privies; as deed of *non campas* is good against himself, and void against heirs, executors, &c. but the reason of that is a particular maxim in law, that a person of full age shall not stultify himself; but that case is not like ours, which can better be compared to inferior jurisdiction; as in case of proceeding in THE MARSHALSEA, where they have not jurisdiction, he may against his own suit say, that they are void. 2. *Cro. 353. Mo. 787.* Prohibition to stay the party's own suit, and yet there jurisdiction might be made, *Vernon's Case* (b); If jointure be made for life of husband, remainder to another for life; remainder to wife for life, for her jointure; though he in remainder die, living husband, and that after the husband's life the wife enters, it is not thereby made a good jointure; because at first creating it was not a good jointure. If a person qualified to keep two chaplains, retain three, and one of them dies before any of them is advanced to a benefice, yet none of the other two are qualified for a plurality, because of the original ill retainer, being not pursuant to the authority of the statute (c). If a bishop make a lease for four lives, and one of the lives expire, bishop dies, his successor shall avoid it, though it have all the qualifications except a legal commencement; but that exceeding the authority given by statute, it is void for all (d). The dean put his seal to a lease, without the consent of the major part of the chapter, but they assented to it after, yet it was void (e). If after the statute of 11. *Hen. 7.* he in rever-

* [360]

(a) 1. *Danv. Abr. 619.*

(d) 10. *Co. 32.*

(b) 4. *Co. 1.*

(e) *Davis Rep. 44. 48.*

(c) 4. *Co. 9.*

PULLIN
against
PUNBECK.

* [361]

tion release to silence of wife, without his consent, the release is void; because it appears not of record. If upon the statute of *Hen. Burnell*, lands be extended at too high a rate, the comers may pray that extender may take them at that rate, and pay him; and thereupon the sheriff may deliver the land to the extenders (a): but there the party must make his challenge at the first day of return, because he has an election to except, or take the land (b). We cannot be estopped here, because a void act cannot work an estoppel. 14. *Hen. 7.* (4.) 22. *Hard.* 465. No record estops, if the Court has not jurisdiction; and every estoppel is reciprocal. 1. *Inst.* 352. Estoppels must either bind both or neither; so if they be not bound, if we should bring an ejectment, we cannot be bound now.

HOLT, Chief Justice, upon the argument now, said, that what stuck with him most was the acceptance and length of time; for the sheriff returned that he had delivered the land in execution, which imports an acceptance, and now he comes to avoid his acceptance after so long time; and where one comes to disapprove an extent upon a statute-merchant, he must say, that he has not accepted. So here, why should he not come and shew that more than a moiety was extended? and if the sheriff will return "*liber ravi parti*," where he refuses to accept, an action will lie against him for a false return. And though it be a rule that things *ipso facto* void cannot be made good by acceptance, yet it is not without exception; as if tenant in tail make a lease to commence *in futuro*, and die before the day, and the lessee enter, the issue in tail may have trespass against him, or he may by acceptance make it good. If tenant in tail make a lease to commence *in futuro*, and afterward make a feoffment in fee, and the lease commences, the feoffee may avoid it, or make it good by acceptance. If a tenant in tail of a rent grant it in fee, it is void by his death; but if the issue affirm it to be good, and bring a *formoden*, he may be barred by warranty. If the land of one purchaser be extended, and the lands of another purchaser omitted, if he whose land is extended bring *audita querela*, he shall avoid the whole; and there are two writs in such cases; the one an *audita querela*, the other only for contribution: And he said, the case in *Brownlow* may be good or bad law, as it is put; for if there be two judgments, and the defendant is seised of twenty acres, and a moiety of them is extended upon one, and an extent goes upon the other; and inquiry thereupon finds him seised of twenty acres, without any notice of the former extent, and hereupon the other moiety is extended; this is well, though in truth a moiety of the remaining moiety ought to be extended. And if the land of one purchaser only be extended, the plaintiff has no remedy; yet the defendant has remedy by *audita querela*, and will make the plaintiff account to him for all the mean profits. If there be two bound jointly

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(a) Bro. Abr. "Judgment" 143. (b) Year Book 44. Edw. 3. pl. 2. Mocr, 753. and

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and severally in a bond, and one of them is sued first, and judgment is against him, and the other is sued, and judgment likewise against him, the first is taken in execution, and after *alegit* against the other, whereupon his lands are extended; the first shall be discharged upon *audita querela*.

PULLIN
OPINION
P. 1152.

PRATT, Serjeant, in Trinity Term after, argued for the defendant, and HALL, Serjeant, for the plaintiff.

PRATT argued that *the extent* was not merely void; and that if it were void, or voidable at election, it was only so at the election of the defendant, and not of the plaintiff; and this being a just debt, which the defendant must pay one time or other, he may think it an advantage to have more than a moiety of his land extended, for that the incumbrance may be the sooner discharged; and that this was agreeable to the reason of the law in other cases; as in case of an infant, who, wanting understanding to contract, cannot by any act of his bind himself, except for necessities; yet he may make a lease, reserving rent, which though void absolutely, yet because possibly it may be for his advantage, he may allow of it when he comes of age; or he may have trespass against lessee for entry; or bring debt for the rent, and make it good. 18. Edw. 4. 1. a. 2. a. 3. b. 4. a. where in trespass, the lessee justified as lessee of plaintiff, who replied non-age in him at time of lease made; and adjudged he might have trespass or debt for the rent. So of a sale of goods by an infant, he may have trespass for the taking, or debt upon the contract; and it is made a *quære*, if an infant sell a horse, and take the money for him, whether he should have trespass; but if an infant make a feoffment and livery, it is not void, but voidable; but if the livery be not by his own hands, it is void. So if a *feme covert* make a lease, it is void; but if she join with her husband in a lease of her land, it is at her election, after her husband's death, to affirm or avoid it, because it may be for her advantage: So here it may by possibility be for the advantage of the defendant to have more than a moiety extended; therefore he ought to have the election to affirm this *extent* or not; and this rule holds even upon constructions upon acts of parliament; as by the statute *De Donis*, there is an express disability upon the donee or issues from alienating to bar the issue; and a tenant in tail has no more power to make a lease to bind the land after his death, than the sheriff to extend more than a moiety, by this statute; yet if a tenant in tail make such a lease, his issue may make it good, if he please; because it may possibly be for his advantage so to do; and a successor may make a lease good, not warranted by the disabling statute of *Queen Elizabeth*. It is objected, that the sheriff has but a bare authority, which he must pursue strictly, otherwise his act is intirely void; and what is altogether void, cannot be made good by any subsequent agreement; as in *Pennant's Case* (a), a lease for years, with condition

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(a) Under the title of *Harvey v. Oswald, Moor*, 456. Cro. Eliz. 553. 572. 3. Co. 64.

PULLEN
against
POWELL.

plaintiff had entered by virtue of *the extent*, for the Book is, "the plaintiff's entry was no disseisin;" and it may be then after actual entry the defendant is put to *audita querela*; but here an entry cannot be supposed, because we say execution remains to be made. SECONDLY, The writ of *audita querela* must have been brought by the defendant; but we are plaintiff, and no such writ lies for us. THIRDLY, If it had appeared to the Court only by affidavits that more than a moiety was extended, it would be hard to relieve, even upon *audita querela*, because of the danger of avoiding a record by affidavits. FOURTHLY, This case is not found in any other Book.—It is also objected, that the return of a delivery to us amounts to an acceptance and entry by us. But I answer, that every acceptance or satisfaction implies two things: FIRST, Good authority in him that gives the satisfaction. SECONDLY, Consent of him to whom it is given in satisfaction, to receive it in satisfaction; but here appears no acceptance by us, and the sheriff does not return that he delivered us the possession: And he urged the case in *Dyer*, 299. pl. 31. where execution being sued by executor of conusee, and the death of the conusor returned, and that he died seised of the manor of *Bradley*, without shewing of what estate; and after *liberate* thereupon, and a return of service thereof, and that the executors had accepted thereof; and held that the first execution was void, and that a new extent should go. *Vide Cra. Eliz.* 310.

* [366]

HOLT, *Chief Justice*. Surely delivery implies an acceptance; and he said, it had been very proper to come and oppose the filing; and he said, that delivery in this is as complete a possession as is given upon an *habere facias seisinam* upon a recovery to use; for that possession is not actual, but only such as vests the right in the plaintiff, and makes the other continuing in a wrong-doer; whereupon he may bring his ejectment; and we ought to intend an actual entry, if disturbance appear not, and the estate of tenant by *elegit* determines without more ado, upon levying of the money by effluxion of time, if eviction or expulsion appear not. And at common law, if land of one purchaser only had been extended, he might have avoided *the extent*, yet it was good against the plaintiff till avoided; but he concluded that he thought *the extent* was void, but doubted only upon the acceptance; and he agreed, if *the extent* be void, and the plaintiff entered by virtue of it, he would be a trespasser; and that the party cannot aver against the sheriff's return.

At last it was argued in *Hilary Term*, in the thirteenth year of *William the Third*,

By COWPER for the defendant, and MULSO for the plaintiff, upon the single point of acceptance.

COWPER. It is agreed that prayer of an *elegit*, and an entry thereof on record, is no bar of another execution, because the bare taking

taking out the writ is not the election; for though *elegit* be taken out, and goods taken in execution upon it, and no lands extended; this does not conclude from taking out a new execution; and this *Hobart* himself, who would carry the matter very far, does agree. And this appears by the statute of 32. *Hen. 8. c. 5.* before which if lands in execution had been evicted, the plaintiff had no remedy; but now that statute gives *scire facias* to have execution of the residue; and he concluded from thence, that if this *scire facias* lay not upon the statute, it would lie not at all. Before and since that statute one may have several writs of *elegit*, but they must be the same continued execution; for a man cannot have two writs of *elegit*, to execute one first, and then another, but they must be one continued execution, as an *alias* and *pluries*: Upon *nil* returned upon the first, he may have a second, which is a continuance of the first. 21. *Hen. 7. 19.* *Br. "Elegit" 17.* An *elegit* may go upon * a *testatum* into another county, or upon an *alias testatum* into the same county; but there the plaintiff must come into the court and have an entry made, &c. *Cro. Eliz. 310.* One may have several *elegits* into several counties, but that still is but one execution. *Rast. 265. a. Petit separalia brevia*; but once *elegit* is returned executed, if the party do not immediately come and except to it, it is final. *Cro. Jac. 338. 1. Roll. Rep. 8.* That taking *extent* of lands upon an *elegit*, is like taking a lease for years in satisfaction of your debt; so that the *extent* is a satisfaction in law. 22. *Edw. 3. 17. Aff. pl. 44.* That there may be a re-*extent* for the plaintiff as for the defendant, but held it must be when he comes at the return of the writ, and shews reason before it is filed. So is 44. *Edw. 3. (2.) pl. 15.* Conusee after return filed, prayed the extenders should take the land according to the statute of *Alton Burnell*; but the Court told him he was too late, for the sheriff had returned that he had accepted the land. *Fitz. "Extent" 12. 19. Edw. Land was extended twice, and the conusor could have no remedy, because he did not come at the first day. Moor, 341. 1. Roll. Abr. 204. Cro. Eliz. 310.* he said were for him; It was a sale of a term by virtue of a second *elegit*, after a former returned and filed; and held that the second was only voidable at most. But *Moor* says, that if it appeared that the land upon the first *elegit* had been extended and accepted, and that after he took a new *elegit* and extended other lands, it were utterly void; for upon return of the first on record, the plaintiff is out of court. And *POPHAM*, in 3. *Cro. 310.* says, "*super quo* the plaintiff came, viz. at the return of the writ." And the word "*such*" is remarkable in the report of the case in *Moor*. BUT IT IS OBJECTED, that in none of the cases aforesaid it appears on the very return that more than a moiety was extended. Surely it will not be pretended this *extent* is so great a nullity, as if no *elegit* had been sued out at all, or but a *fieri facias*, for here are goods in execution by it, which could not be but upon this writ; for upon *elegit* the goods are to be appraised and delivered to the plaintiff himself; upon a *fieri facias* they are to be sold, and the

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against
PURBACH.

Vide 1. Sid. 437.

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THORNTON
against
CROCKER.

make out a writ against five, one being dead, and he made out a writ only against four, and held not amendable; and full costs given on quashing the writ of error.

Case 614. The King against The Inhabitants of Shippingfaringdon.

Order of justices
conclusive, till
set aside on ap-
peal.

A POOR PERSON was removed by order of two justices from *Warwickshire* to *Oxfordshire*, and the justices of *Oxfordshire* remove him by a new order to *Berkshire*.

The second order was quashed *nisi*, for that by the first the parish in *Oxfordshire* was adjudged to be the place of his last legal settlement; and that order is conclusive to them, till falsified by appeal, not only as to *Warwick*, but as to all other places; and the sessions have no power to make a new order; but the way is to send him back from whence he came, and for the justices of *Warwick* to make a new order; and if on appeal the first order be confirmed, the parties are for ever concluded, as to all places.

Though B. R.
will not affirm
an order, are not
obliged to quash
it.

But at another day, because it would be a vast way to send him back,

HOLT, Chief Justice, said, Let it stay; for though we cannot affirm it, yet we may stay the quashing of it.

NOTE, Here it was only said, that it appeared to them he was likely to become chargeable (a), without saying, that it was on complaint of the churchwardens, &c.

Peston, 276.

HOLT, Chief Justice, said, that must be intended.

(a) Now by 35. Geo. 3. c. 101. no person can be removed until they are actually chargeable.

Case 615.

Anonymous.

Nisi prius is on
the *distringas*,
that the parties
might know the
jury.

PER CURIAM. The reason why the *nisi prius* is upon the *distringas*, is to the end the jury might be returned above, that the parties might know them, in order to their challenges; and before the statute of 42. Edu. 3. c. 11. it was always upon the *venire facias*.

Case 616.

Anonymous.

No costs for new
trial granted for
irregularity; al-
lows if on the
merits.

PER CURIAM. If a new trial be granted for irregularity, there shall be no costs paid for it; but if defence be made; it may help the irregularity. If new trial be upon the merits of the cause, there must be costs (a).

(a) See Hullock on Costs, 383. 387.

Butler

* Butler and Lewin against ———.

Case 617.

THEY brought a joint action upon the case, for a false return to a *mandamus* to swear them in as churchwardens of the parish of ———.

A joint action does not lie for a false return to a *mandamus*.
Ann. 349.

After verdict IT WAS MOVED in arrest of judgment, that they had misconceived the action by making it joint; for the damages, viz. the loss of fees, are several.

And this exception weighing much with the Court, the matter was compromised (a).

And PER CURIAM, Here, though the motion be made in arrest of judgment, yet, if there be no rule to stay, the plaintiff may sign his judgment of course.

If there be no rule to stay judgment, it may be signed.

(a) See Espinasse Dig. 686. and 9. Ann. c. 20.

Anonymous.

Case 618.*

WRIT OF ERROR of a judgment in a recognizance upon a *seire facias*, was "*Quia in adjudicatione executionis super "judicium præd."* instead of "*super recognitionem præd.*"

Error in the entry of judgment on recognizance.

And was for that quashed.

Boise against Bruerton.

Case 619.

ORIGINAL sued out to *Suffolk*, and the action laid in *N.* and judgment thereupon reversed for this error.

Original in a different county.

Keeling against Morrice.

Case 620.

COVENANT against the administrator of the assignee of a term generally in his own name, upon a covenant, in the original demise, to repair; and a breach in his time.

The administrator of the assignee of a lease, is liable for a breach of the covenant to repair, although the assignee are not mentioned in the covenant, for it runs with the land.

And agreed, that this covenant ran with the land, and bound the possessor without the word "assigns." 5. Co. 15. and *Dean and Chapter of Windsor's Case*, Mo. 399. 1. Cro. 229. Jo. 245. And he shall not say, I shall not be charged for my own wrong for want of assets, for it is his own act to administer, and he is presumed to have known the covenant annexed to the leases; as well as executors, under pain of *devastavit*, are obliged to take notice of their testator's debts by bonds, and give preference of payment to them; and he might have discharged himself, by assigning over before breach. And by the same reason that he should be charged for the rent *de bonis propriis*, so he ought here for the damages. 2. Inst. 302. An executor or administrator shall be punished

Post. 384.

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punished for waste, whether voluntary or permissive, though treble damages are recoverable in it. 1. *And. 51, 52. 5. Co. Har-
graves Case. Allen, 42.*

And judgment was given for the plaintiff, *nisi*, before the end
of the Term.

* [372]

Case 621.

* Anonymous.

Feme.

Post. 515.

1. Sid. 405.

2. Stra 358.

3. Bl. Rep. 1031. 2. Term Rep. 275. *Tidd's Pract. 306.*

RULE. The common counter affidavit to hinder the change
of *veritas* is to give evidence *de materia in exitu*, where the
action is laid.

Case 622.

Car against King.

Cohabitation

sufficient to

charge a man as

a husband.

Ante, p. 245.

DEBT against a husband for the lodging of his wife, and proof
only made, that he formerly cohabited with her, and owned
her as his wife.

AND HELD sufficient to charge him (a); but that he might dis-
charge himself by giving *elapement* in evidence (b) & for they that
will trust a wife that has eloped, do it at their peril (c).

(a) See *Langford v. Tyler*, Salk. 113.

Stockland v. Charland, Burr. S. C. 508.

Norwood v. Stevenson, Bull. N. P. 136.

Hudson v. Brent, Espinasse Dig. 124.

(b) *Manwaring v. Sands*, 2. Stra.

706.

(c) See Mr. Nolan's note to the case

of *Belson v. Prentice*, 2. Sess. 1214.

Case 623. The Farmers of Newgate Market against The Dean
and Chapter of St. Paul's.

In what case
one man may
have an enfe-
nement another's
possessions.

AT *nisi prius* before HOLT, Chief Justice, the question upon
evidence was, Whether every house in the market round had
not so many feet of ground towards the market belonging to it?

HOLT, Chief Justice. If the act for building of *London* orders
a man to build his house contiguous to his neighbour's soil, it of
necessary consequence gives you all easements over your neigh-
bour's soil, as lights, passage, &c. without which you cannot use
your house, but thereby gives no interest in the soil.

Witness inte-
rested.

And in this case, a house-keeper, who pretended the like inte-
rest before his door, though he derived his title under another
person, was denied to be a witness.

Anonymous.

Anonymous.

Cafe 624.

HOLT, Chief Justice. A difference has been taken, that if one come in upon a *cepi corpus* in custody, he must plead *instantor*; *scilicet* where he has been bailed, and comes in upon the *cepi*; but surely there is no reason for this difference, for the return is the same in both cases; and the party ought not to be the harder used because he could not find bail.

There is no difference as to time of pleading, whether a defendant come in upon a *cepi* in custody or on bail.

Post. 404.

* [373]

Cafe 625..

Stout against Towler.

SPENCER COWPER, barrister at law, justice of peace, and captain of the militia, and one *Mason and Rogers*, having been indicted and acquitted in *August* before, at *Hartford* * assizes, of the murder of *S. Stout*, a quaker-woman (a); an appeal was brought within the year, by an infant twelve years old only, next heir to the deceased, but he was not mentioned in the writ to be an infant; and delivered to the under-sheriff, *Towler's clerk*, in *Towler's* absence. The appellant after the *teste*, and before the return of the writ, chose the deceased's mother for his guardian, before **HOLT**, Chief Justice, in his chambers, and she was then and there accordingly admitted. After the writ was returnable, the mother of the appellant, at the instance and procurement of *Cowper*, came and demanded the writ of the sheriff, and the sheriff, without any assurance that the infant was the appellant, or that the party who came with him was his mother, delivered the writ to them, who destroyed it.

If an infant, as next heir, sue out a writ of appeal, and deliver it to the sheriff, and the sheriff, after guardian appointed, and before the return of the writ, by collusion with the appellee, induce the infant and guardian to recall the writ, and deliver it to them accordingly, it is a contempt of the process of the court, for which he may be fined, although the Court is not in possession of the writ until it is returnable; and the guardian may discontinue the appeal.

All this appearing to the Court, by the sheriff's own confession, and he being put to answer interrogatories confessing further, that he, upon receipt of the writ, had sent a copy of it to *Cowper*, the defendant's brother, and likewise notice to *Cowper* the defendant;

COWPER, the appellee's brother, being king's counsel, **SIR B. SHOWER** and **WARD** urged in behalf of the sheriff, **FIRST**, That the infant having no guardian at the time of the writ purchased, it was not well sued out. **SECONDLY**, Though it were rightly sued out, yet the appellant had a right to come and recall it; and the sheriff ought not to deny to give it him; for otherwise he would be liable to an action, if after such denial he executed the writ, and thereby subjected the appellant to fine and imprisonment, in case of acquittal. *Vide* 3. *Bullst.* 97, 98. 1. *Roll. Rep.* 240, 241. *Latch*, 19. That the sheriff in that case must take notice of the plaintiff, at his peril. And the appellant's being an infant alters not the case; for the law, if it enable him to sue out a writ, will enable him to recall or discontinue it; as a *feme covert*

S. C. Holt, 483.

(a) See the trial of this very extraordinary case, 5. *State Trials*, 794 to 799. 2. *St. Tr.* 435 to 510. 1. and 10. *St. Tr.* 221.

levying

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levying a fine may lay the uses of it. And 1. *Roll. Abr.* 288. an infant discontinued the appeal in despite of the guardian. THIRDLY, It was urged, that this Court were not possessed of the writ till the return, for till then it was not pending; and therefore what is done in relation to it cannot be a contempt of the Court, or examinable here. FOURTHLY, The being of a guardian here is not material; for he has nothing to do till the writ is returned, and till then the sole right is in the infant.

No guardian necessary to sue out an appeal for infant.

* [374]

To which it was answered AND RESOLVED, as to the first, that there needs no guardian till the writ be returnable; for the use of a guardian is to pursue it when it is before * the Court, and not, as here, to complain of the officer for not making a return; and that anybody might sue out the writ for the infant, as well as enter upon a disseisor of him; and there is nobody in law who writ it is, before the return, but the infant's. SECONDLY, One of age may come and recall the writ; but this being an infant, it is otherwise; and he could not release this suit; and if he, at the return of the writ, had been present in court, and the guardian not there, he should be nonsuited, which puts an end to the appeal. *Latch*, 173. and that shews that the infant, after guardian chosen, has nothing more to do with the matter. Indeed the Court, if they see occasion, may suffer him to discharge his guardian, and disavow the action; but that must be in court, and the Court may refuse to do it, if they see good reason in their discretion. And if an infant, pending the suit in trespass, &c. comes of age, and judgment be against him, he shall be fined. The law in this case takes care that the guardian, such as the Court shall appoint, shall sue for the infant, and the Court and law have the immediate care of infants, as not being able to help themselves; and it were an odd thing, that an infant, who cannot otherwise prosecute but by guardian, should be able to discontinue his writ; or that he, by himself, could discontinue out of court what he cannot, by himself, continue in court. And as to the third objection, he said, that though the Court had not possession of the writ till it were returned, yet surely they may bring their officer to an account, what writs he has returnable in this court, and punish him for any abuse in relation to them (a); and such misdemeanor is a contempt of the Court; and he quoted the case of one *Starkry*, steward of *Windsor* court, where it was adjudged, that a misdemeanor in an inferior court is an offence against this court: and the case of 28. *Hen. 6. pl. 28.* was likewise quoted by him; where a sheriff was fined forty pounds for refusing to make a return; and he said, if any sheriff in *England* had served him so, he would lay him by the heels. And here he said, it were better, in this case, if the writ had mentioned the appellant to be an infant; however, it was well without it: And returning the writ to the infant and a stranger here, is the same as if he had delivered it to

(a) If after writ of error out and before return execution be executed, we would lay them by the heels.—Not a to former edition.

a stranger;

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a stranger; if we suffer this to go unpunished, the subjects must expect but little justice; for the sheriffs shall have it in their power to anticipate our justice. And this is not a private matter, but the king is concerned; for though the appellants be nonsuited, yet the king shall proceed upon it; and if the *appellee be acquitted before, he must plead it, for we cannot take notice of it.

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* [375]

And here he was judged in contempt, by HOLT, *Chief Justice*, and GOULD, *Justice*, against TURTON, *Justice*, and fined two hundred marks.

NOTE, In this case, the year having expired, they could not have a new writ of course; and for this they petitioned THE LORD KEEPER for a new writ; who assembled TREBY, *Chief Justice* of the common pleas, SIR JOHN TREVOR, *Master of the Rolls*, and POWELL, *Justice*, to advise of it; WHO ALL AGREED, it was discretionary to grant one or no; but agreed it was not proper to do it: Some, especially TREBY, *Chief Justice*, alledging for reason, that an appeal was a revengeful odious prosecution, and therefore deserved no encouragement.

If an appellee continue to frustrate the effect of an appeal until the year and day expire, the court of chancery may in its discretion grant a new writ.

On which occasion HOLT, *Chief Justice*, with great vehemence and zeal, said, that he wondered that any *Englishman* should brand an appeal with the name of an odious prosecution; that for his part he looked upon it to be a noble prosecution, and a true badge of *English* liberties; and referred to the statute of *Gloucester*, and the comment thereupon in the *Second Institute*.

Anonymous.

Case 626.

AT nisi prius coram HOLT, *Chief Justice*, in an avowry for a rent-charge devised to the plaintiff, he could not produce the will that belonged to the devisee of the lands charged, who claimed them by the same will; but he produced the ordinary's register of the will, and proved former payments; and held sufficient evidence.

In avowry for a rent-charge by devise, the register of the will, and former payments good proof.

The will was, "I devise my lands in the parishes of A. and B. to J. S. and I devise a rent to J. N. out of my lands in the parish aforesaid."

A rent charge-able on lands.

And per HOLT, *Chief Justice*, It is good to charge the lands in both parishes.

Adams against Arnold.

Case 627.

TRESPASS for an assault upon the plaintiff's wife, and getting her with child; and what the wife declared in her labour rejected to be evidence (a).

In crim. con. the declaration of the wife is not evidence.

(a) Same point ruled in the case of Baker v. Morley, Guildhall 1739. Bull. N. P. 28. but a discourse between her and the defendant may be proved: so letters written to her by the defendant may be read as evidence against him, though her letters to him will be no evidence, Espinasse Dig. 343.

S. C. Holt, 298.

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Plaintiff cannot discredit his own witness. And here HOLT, *Chief Justice*, would not suffer the plaintiff to discredit a witness of his own calling, he swearing against him (a).

(a) Ruled accordingly by THURLOW, Lord Chancellor, in Mr. Hastings's case, 11th June 1789, in the House of Lords. But see Bull. N. P. 296, 297. In what cases the credit of a witness may be impeached.

* [376]

Cafe 628.

Sessions can only affirm or quash, not make an order.

* The Parish of Ovencot *against* the Parish of Grindow.

AN order of sessions recited an order of two justices, for the settling a poor person in the parish of *Ovencot*, and concluded in the nature of a special verdict, *viz.* "If the poor of right belongs to the parish of *Ovencot* we confirm, if to the parish of *Grindow* we quash the order; but to which it does belong of right, we submit to the court of King's Bench."

IT WAS RESOLVED, that the sessions had no power to make orders for settling poor; but their business was only to quash or confirm orders, on appeal to them.

A *certiorari* to remove an order from sessions is good, though there has been no appeal.

IT WAS OBJECTED. that here no appeal appearing, the quarter-sessions were not legally possessed of the order, and then it could not be removed by *certiorari* from the sessions hither.

S. P. post. 402.

HOLT, *Chief Justice*. It is proper for the justices that make the original order to bring it to the sessions; that it may be entered on record there; and it were to be wished that were practised; as when I receive a recognizance in my chamber, I ought to bring it into court (a): and since in like manner, an order of two justices may well come to the quarter-sessions by the hands of the justices that made it, it may well be removed from thence hither by *certiorari*.

The court will not quash an order of removal, because it only says the pauper was likely to become chargeable.

THEN IT WAS OBJECTED against the first order, that it is not enough to say, that the poor person is likely to become chargeable; for if he bring a certificate from his former parish, that in case he does become chargeable, they will take him back, he is not removeable by the statute of 9. Will. 3.

PER CURIAM. That ought to come of the other side, and would be ground for an appeal (b). And we are bound *ex debito justitiæ* to confirm an order, if nothing appear why it should be set aside.

And the order of sessions was quashed, and the other confirmed.

(a) See S. P. post. 402. (b) See *Rex v. Shippenfarrington*, ante, 370.

PARAMOUR

Paramour *against* Johnson.

Cafe 629.

ASSUMPSIT upon several promises; plea, that the defendant paid such a sum, in satisfaction of all promises, till such a time, which the plaintiff received in satisfaction; *ABSQUE HOC*, that he made any promise since.

The plaintiff demurred, for that the plea amounted to the general issue (a).

HOLT, Chief Justice. It is no true rule, that where defendant may plead the general issue and give the special matter in evidence, he shall not * plead specially. Wherever you may plead matter in law which avoids the cause of action you may plead generally, and give that matter in evidence; or you may plead it specially; and upon all general issues you may give special matter in evidence. If you *give colour*, you may plead it specially; as in debt for rent, you may plead *nil debet*, and give release in evidence. *Vide Lyfield's Case (b)*, where in trespass for goods, the defendant confesses the taking, but says he bought them in market overt. But it is indulgence to give accord with satisfaction in evidence upon *non assumpsit* pleaded; but that has crept in, and now is settled.

Matter in law which avoids the action, may be pleaded generally; and that matter given in evidence.

Ante, p. 97. 101.

121. 214.

S. C. 1. Ld. Ray. 566.

4. Bac. Abr. 60.

* [377]

Ante, p. 354.

Postea, Pasch.

13. W. 3. Saunders's case.

Gillb. C. B. 65.

But here it appearing the sums paid were less than those declared upon, the plaintiff had judgment; **THE COURT** holding, if it had been a collateral satisfaction, the plea had been good.

Wide 1. Infl.

212. b.

(a) See 1. Com. Dig. "Accord" (A. 1.) page 96. (b) 10. Co. 88.

Anonymous.

Cafe 630.

HOLT, Chief Justice. If a writ of execution be taken out within the year, and the sheriff make no return to it, upon entering a *vicecomes non misit breve* once a year, you may continue it, and not be put to sue a *scire facias*.

Execution after the year without *scire facias*.
Ante, 84.

The King *against* Chaloner.

Cafe 631.

AN information was against him for killing my Lord S.'s dog, setting forth, that Lord S. was riding in the vill of D. in the county of *Middlesex*, and that his greyhound being *tunc et ibidem* following him, the defendant drew his sword, and *tunc et ibidem* killed the dog. Not guilty pleaded; and at *nisi prius* the defendant *relieta verificatione* confessed the action; and **THE POSTEA** was, "that at *nisi prius* at such a day, the defendant *relieta verificatione* confessed the action."

A confession entered on **THE POSTEA** thus, "that at *nisi prius* on such a day, the defendant *relieta verificatione* confessed the action," is bad.

HOLT, Chief Justice. You should not have mentioned the *nisi prius* at all, but have entered it as of a Term before; or, since you

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THE KING. have mentioned it, you should have shewed that the jury was
against called, &c. and then the defendant *relies*, &c. for now you tell
CHALONER. us of a *nisi prius*, and shew nothing that was done there.

Averment that BROTHERICK excepted, that it did not appear what county the
A. was at D in dog was in; for though Lord S. is said to be in *Middlesex*, the dog
Middlesex, and might be in another county, and the *adunc et ibidem* shall only go
that his dog was to the vill, which may extend to more counties than one.

then and there SED PER CURIAM, It shall go to both.
following him,
shall extend to
both places.

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Cafe 632.

* Ashmond against Ranger.

TRESPASS by lessee for years of a copyholder's widow, hold-
ing in of her widow's estate according to the custom, against
the lord, for cutting and carrying away several timber-trees upon
the copyhold land.

And in this case several questions were moved at the Bar.

FIRST, Whether the lord could enter upon the copyholder, and
cut trees for his own use?

SECONDLY, If he could not, in case he did it, what remedy the
tenant had against him; whether trespass or case, or both?

THIRDLY, Whether in case the lord cannot do it, whether the
tenant may; or in case he cannot justify cutting, whether by
cutting he forfeits his estate?

And it was said at the Bar, that a copyholder might cut for
necessary repairs, and estovers, and not otherwise; therefore the
lord may cut them, or else it would follow, that here would be a

noble wood, and nobody have right to cut it; and so it would be
useless to the public, and never to be cut in case of copyholder
in fee.

But NORTHEY, who argued thus, said, if the lord in that case
should cut down all the wood, or so much of it as not to leave suf-
ficient for repair and estovers, the tenant's remedy was by action
upon his case, and not by way of trespass; as where a man grants
estovers out of his wood, and after cuts all down, or so much as
not to leave sufficient estovers, his remedy is case, and not tref-
pass. *Mo. 727. Cr. El. 629.* And he said, it was absurd to say
that the lord, who had the interest of the trees, should not have
power to cut them; and *Coke* in his case of *Heydon v. Smith* (a)
says, the lord without any special custom may cut the trees; and he
that has the special interest of a thing, cannot hinder him that has
the general interest from using it; but if he use it so as to destroy
or impair the special interest, he has his action upon his case.
And copyholder for life cannot open a mine, for tenant for life
at common law cannot do it.

(a) 13. Co. 67. S. C. Godb. 72. S. C. Coke's Rep. 79 S. C. Brownl. 323.

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IT WAS ARGUED *contra*, that the copyholder had the same interest in the trees that he had in the estate; and there is no difference between a copyholder for life or in fee, and tenant for life or in fee at common law but what the custom does make; and they are not bare tenants at will, but tenants at will *secundum consuet.* &c. and while they observe the custom, they have as absolute and as indefeasible * an estate as any like tenant at common law has. *Vide Litt. f. 77. 2. Hen. 4. pl. 12.* where the question was, whether the tenant should recover in value, and not whether the action lay, for that was taken for granted in respect of the interest he had in umbrage, shrouds, &c. Besides, the tenant has the absolute ownership of the land according to the estate, and may convey and release his right at pleasure; and when he surrenders into the hands of the lord to the use of another, *cestuy que use* is in from the surrenderor, and not from the lord, who is only an instrument; and he shall plead the surrender as a grant from the surrenderor. So if the right of every part of the land be in him, he necessarily must have a remedy for an injury done to his right, for the law cannot suffer a right to be without a remedy; and that a copyholder may cut trees to repair. 1 *Ro. Ab.* 508. 1. *Sid.* 152. That copyholder may dig a mine, which lord cannot do, if he have not a joint interest with the copyholder. And if the lord ejects his copyhold tenant, he shall have trespass against him for it. 2. *Saund.* 422. *Noy* 14. it well lies in this case. 13. *Co.* 67. 2. *Brownl.* 328. And if he may have case for injury done him in the lord's own soil, as in the case before put of the estovers, surely he may have trespass for injury in his own soil. *Vide Yel.* 104, 105.

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or
RANGER.

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Then it was added, that however it would be in case of a copyholder, yet it was clearly maintainable here, it being lessee for years, who has an estate at common law; and it was said copyholder may make a lease for years without any custom to warrant it.

HOLT, *Chief Justice.* This being by lessee for years, without dispute will not alter the case, because he is lessee of a copyholder, and *nemo potest plus juris in al' transferre quam ipse habet.* But as to the main point, if the lord cut down so many trees as not to leave sufficient estovers, &c. the copyholder shall have trespass, and the value of the trees in damages; but if he leave sufficient estovers, then he shall have trespass too, but shall only recover special damages, *viz.* for the loss of his umbrage, &c. breaking his close, treading his grass, &c. And the tenant has the same customary or possessory interest in the trees that he has in the land; and if the lord has a mind to cut trees, his business is to compound with the tenant. 3. *Cro.* 361. that tenant may lop under-boughs, and cut for repair and bote. And 3. *Cro.* 5. is not law, as appears by the case of *Heiden v. Smith.* 13. *Co.* If

1. *Cro.* 377. 437.
Vide 1 *Cro.* 221.
1. *Jo.* 244.

ASHMOND
against
RANGERS.

All copyholders
have estovers of
common right.
Yelv. 188.
Moor, 18, 19.

birds build nests in the trees, the * eggs are the tenant's, which shews he has the possessory interest in the trees, though his estate be but for years. And whether the lord may cut trees, leaving sufficient estovers, is very gently trod on in the case of *Heiden v. Smith*; but no copyholder can commit waste without a special custom, but all copyholders have estovers of common right. If a man grant all his estovers, and cut down the wood, or do any other act whereby the grantee loses the benefit of the grant, case will lie. And so *Yelverton* and *Goldborough*.

Judgment was given for the plaintiff (a).

(a) It is said, that THE WHOLE COURT were clearly of opinion, that judgment ought to be given for the plaintiff, because it appeared that the plaintiff had not enough to repair without these trees, S. C. 1. Ld. Ray. 552. S. C. Fort. 154; and on the defendants bringing a writ of error in the exchequer chamber, the judgment of the court of King's bench was affirmed, S. C. 2. Salk. 638. S. C. 11. Mod.

18; but afterwards a writ of error was brought in Parliament, and on Monday 28th April, 1702, both judgments were reversed, ten lords being for affirming and eleven for reversing, S. C. 1. Ld. Ray. 552; for the tenant could not cut the trees; and if the lord could not, then nobody could, and they must rot on the land. S. C. 2. Salk. 638.

Case 633.

Carter against Palmer.

A promissory
note payable to
bearer was not
negotiable on
the custom of
merchants, but
was evidence of
money lent to
the drawer.

PALMER had given a note under his hand in this form, "I PROMISE to pay the bearer so much money on demand." The plaintiff brings his action, grounding it upon the custom of merchants, as if it were a bill of exchange; and avers no consideration.

After verdict upon motion in arrest of judgment,

HOLT, Chief Justice. We will take such a note *prima facie* for evidence of money lent (a); and though they have declared on the custom, yet we must take care that by such a drift the law of England be not changed by making all notes, bills of exchange (b).

Vide ante 36.
acc.

BUT ALL SEEMED TO AGREE, that if it were made payable "to him, or order," the defendant by that form had made it negotiable (c), and by consequence he would be liable to the action of the assignee in his own name; for if a man who is no merchant will draw a bill of exchange, he is suable upon it, according to the custom of merchants, for he makes himself a merchant *pro tanto* (d). And inland bills were not known till trade grew to a great height;

(a) See *Clarke v. Adair*, Esp. Dig. 26. *Grant v. Vaughan*, 3. Burr. 1516. *Tatlock v. Harris*, 3. Term Rep. 174. *Kyd on Bills of Exch.* 197.

(b) Promissory notes are now by 3. & 4. Ann. c. 9. put in every respect on the same footing as bills of exchange. See

Brown v. Hampden, 4. Term Rep. 148.

(c) See *Pollet v. Pearson*, 1. Salk. 129. and 3. & 4. Ann. c. 9. f. 1. and *Moor v. Paine*, Cases Temp. Hardw. 288.

(d) Vide 2. Vent. 295. *Hodges v. Steward*, 1. Salk. 125.

and
and

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and when they obtained, they received the same law with outlandish bills.

And HOLT, *Chief Justice*, said he remembered, that at a trial upon an inland bill before HALE, the defendant's Counsel would put the plaintiff to prove the custom; but HALE said they had a hopeful point of it.

Et adjourn' (a).

(a) Both bills of exchange and promissory notes payable to bearer are now transferrable. See 3. & 4 Ann. c. 9. Grant v.

Vaughan, 3. Burr. 1516. Miller v. Race, 1. Burr. 452.

CARTER
against
PALMER.

The Duke of Ormond *against* Brierly.

Case 634.

A BOND was taken by the bailiff of W. conditioned, that if obligor, being plaintiff in replevin, should prosecute the suit with effect, &c.

Upon *oyer*, the defendant pleads that he did declare and prosecute the action till such a time, *prout patet per record. inde*; and that pending the suit the defendant died, whereby it did abate by the act of God.

The plaintiff replies, and confesses the plea; but says further, that the defendant sued an *English* bill in the exchequer, and there obtained an injunction to stay proceedings; whereby the suit was delayed, so as judgment could not be had till the defendant's death.

And upon demurrer,

IT WAS URGED *for the plaintiff*, that by obtaining the injunction the defendant had disabled himself for a time to prosecute the suit for a time; and a temporal disability of performing a condition tantamounts to a forfeiture. *Mo.* 400.

CURIA *contra*. For he cannot be said not to continue the suit with effect till nonsuit, *retraxit*, or some other act, by which here is an end of the suit. This bond is in lieu of pledges, which the sheriff is bound to find, and take by the statute of *Westminster the Second* (a); and if he failed to find pledges according to that statute, he would be liable to the avowant's damages, to be recovered by action against him; and where such pledges would not be liable, the obligor that is in lieu of them would not be liable (b).

And judgment for the defendant,

(a) See *Blackett v. Crislop*, 1. *Ld.* Ray. 278.

(b) See *Prowse v. Pattison*, 7. *Mod.* S. C. 16. *Vin. Abr.* 400. *Richards v.*

Aston, 2. *Black.* 1220. *Yea v. Lethbridge*, 4. *Term Rep.* 433. *Concannon v. Lethbridge*, 2. *H. Bl. Rep.* 36. and *Evans v. Brander*, 2. *H. Bl. Rep.* 549.

Bond to prosecute with effect, not forfeit by getting injunction.
S. C. ante, 320.
S. C. Carth.
519.
S. C. Holt, 127.
1 *Ld. Ray.* 278.

* [381]

Cafe 635.

Nicols *against* Bride Bridge.

Bond in trust is
not Assets.
1. Salk 79.

PER CURIAM. A man makes a bond to *A.* in trust for *B.* *A.* dies, his executor receives the money; it shall not be assets.

Cafe 636.

Mikes *against* Caly.

An action on the
cafe lies by a
master of a ship
against the offi-
cer of a corpora-
tion for wrong-
fully distraining
his cargo,
whereby he lost
his voyage.
S. C. Holt, 467.

IN an action on the cafe the plaintiff declared that he was possessed of a ship ready for a voyage to *America*, lying in the harbour of *B.* and was ready to set sail the first fair wind; that the defendant entered upon his possession, and distrained the corn with which the ship was freighted, whereby he lost his voyage, to his damage, &c.

The plea was, that the said *B.* is an ancient borough for several hundred years by such a name, and afterwards incorporated by letters patent by another name; that, time out of mind, there was an ancient court in the borough for administration of justice, &c. That the corporation, time whereof, &c. used to repair and maintain the court-house * at their charge; and in consideration thereof they had time, &c. so much a sack for all corn that was sold in that borough, (in the name of toll,) by any not inhabitant or free of the corporation. That the corn in the plaintiff's ship was bought by persons not inhabitants, &c. and put on board without paying toll: and a prescription for distraining in case of refusal was laid; that the defendant was bailiff appointed by the town, as their bailiff, by writing under their common seal; and upon demand and refusal distrained the corn for the use of the corporation.

The plea was agreed to be bad, chiefly for that it was not laid that it was a corporation time out of mind. 1. *Inst.* 114.

But it was argued, **FIRST**, That, as it was laid, the fact was a trespass, and therefore the plaintiff had misconceived his action; for general trespass, and trespass upon the cafe, are different formed actions, grounded upon different species of offences. 4. *Ed.* 3. 24. 2 *Rel. Rep.* 149. *Palmer* 47. 13. *H.* 8. 26. An action on the cafe for a nuisance for making a lime kiln, without laying it to be upon the defendant's own soil, was held bad; because, if it were upon soil of plaintiff, trespass were the proper remedy, and not cafe, though a consequential damage, *viz.* the loss of water-course, were laid. *Latch* 65. The action on the cafe was against a servant for taking away goods for which toll was due, without paying toll, whereby the goods were forfeited; and there it was questioned whether that were cafe or trespass, but held to be proper for cafe, because a servant who had authority (a). And it was said that

(a) See the case of *Maley v. Gaisford*, in which it is said to be difficult to put a cafe where the master would be considered as a trespasser for an act of his servant which was not done by his command:

in the Common Pleas, Easter Term, 35. *Geo.* 3. 2. *H. Bl. Rep.* 442. But see *Day v. Edwards*, 5. Term Rep. 648, *Savignac v. Roome*, 6. Term Rep.

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N. B. 94. does not warrant the opinions grounded upon it in 4. *Ca.* 94. And he quoted the case of *Thornton v. Austine* (a). An action on the case was brought for entering into a waste and driving cattle, whereby they were damaged; and the judgment was arrested, for that trespass lay, and not case. The case of *Gill v. Darle* (b), was an action on the case for cutting the plaintiff's corn; and the judgment was arrested, for it should have been general trespass; and if every trespass were turned to case, the king would lose his fines (c).

*Mixen
against
CALY.*

*Vide 2. Cro. 50.
123.*

It was further urged, that this action did not lie for the master: *First*, For by the same reason it would lie for every one of the mariners, for every of them too have lost their voyage; and so it would likewise for every of the owners. *Secondly*, It were to maintain an action for consequential damages, with which a stranger may dispense: as if I covenant with *A.* to build a house upon his ground, and *B.* ousts him; by which I am hindered of performing my covenant*, I cannot have an action on the case against *B.* because *A.* by his release may make the hindrance lawful, and so may the owners do here; and if any damage was, the action ought to have been brought by the owner, and the master have his remedy against him.

The master of a ship may bring an action on the case against a corporation for wrongfully discharging his cargo on pretence of non-payment of toll, whereby he lost his voyage.

* [383]

But *PER CURIAM*, The plaintiff had judgment.

And by *HOLT, Chief Justice*, The master of a ship is in many respects suable, and may sue in things concerning the ship, as well as the owner: and the defendant might have title to the goods by sale, or consignment by the owners; but that ought to have been pleaded; and what the master recovers in this action is to the use of the owners. The master may bring an action against any merchant for freight in his own name; but *quatenus* master, he cannot bring trover for the ship, but he may have case, if by a seizure of the ship he be hindered of his voyage, as here; and what is taken from him in relation to the ship, he shall have case or trespass for it at his election, with this difference, that if he bring trespass he must declare upon his possession; and he shall have trespass for a disturbance of him in his office.

ET PER TOTAM CURIAM, Judgment was given for the plaintiff.

(a) Easter Term, 5 Will. 3. entered Hilary Term, 4 Will. 3. Roll. 105.

(b) Easter Term, 9 Will. 3.

(c) See *Pitt v. Gainet and Foresight*, Salk. 10. & *Ld. Ray.* 558.

Reignolds against Davis.

Case 637.

WARRANT of attorney to confess judgment to a *feme sole*, who married before judgment entered; Whether it could now be entered, and how? was the question.

How judgment to be entered on a warrant of attorney by a feme sole who afterwards marries.
*S. C. Salk. 399.
2. Stra. 382.*

It was agreed that it could not be entered for the husband, for that was beyond the authority given. The course is, to make affidavit

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davit of the debt's not being satisfied; and now the wife could not make such affidavit, for the money might have been paid to the husband; nor could the husband's affidavit serve, because it might have been paid to the wife before marriage; but *videtur* that point may be cleared by a several affidavit of each in his time.

And HOLT, *Chief Justice*, said, they had better enter it in the wife's name as *feme sole*; but nothing was done (a).

(a) It is said, that the warrant is countermanded by the marriage. 1 Salk. 399.

Cafe 638.

The Parish of Spittlefields *against* the Parish of St. Andrew's.

A bastard is
settled where
born.

S. C. 1. Ld. Ray.
567.
S. C. Fort. 307.
1. Bl. Com. 362.
2. Conft's P. L.

IN a case where the controversy was between the inhabitants of *Spittlefields* and parish of *St. Andrew*, it was said,

PER CURIAM. That a child could not gain a settlement at nurse; that a settlement for the father is so for the child; and that the place of the child's birth is the place of his settlement, till contrary appears.

* [384]

* Hanckford *against* Mead,

Cafe 639.

Mistake of
plaintiff in judg-
ment for dama-
ges amended.
Vide Hob. 327.
3. Vent. 217.

A JUDGMENT for damages was, "*quod præd. A. recuperet*," instead of "*præd. B.*" and it was amended on motion: And GOULD, *Justice*, quoted a case of *Cradock v. Wills*, where the like fault was amended on his motion after twenty years time; and that the case in *Stile* — was then denied to be law,

(c)

Cafe 640.

Anonymous.

Statute.

PER CURIAM. An act of parliament's reciting *J. S.* to be heir, does not make him so.

Cafe 641.

Anonymous.

Adjournment.

PER CURIAM. We may adjourn a trial at bar without consent of parties.

Cafe 642.

Stanhop *against* Pemperton.

Damages sepa-
rated in writ of
enquiry.

WRIT of error of a judgment in common pleas, where the judgment was by default, and damages separated by writ of enquiry.

HOLT, *Chief Justice*. If there be two plaintiffs, in many cases there may be judgment for one party, and *non prof.* entered for the other; and the judgment upon the *non prof.* is *quod eat inde fine*

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sine die; but where the *non prof.* is only for part of the thing demanded, it amounts to a release only for so much. And he said an attorney might undertake for his client, but not release his cause of action.

STANNON
against
FERMERTON.

Anonymous.

Cafe 643.

A COVENANT was to build a house upon land demised, before such a day, and to keep it in repair, it was "for lessee and his assigns;" and after the day covenant was brought against the assignee for not repairing. The defendant pleads the house was not built before the day; and upon general demurrer,

Covenant to build and repair, does not bind assignee, unless named, being for a new thing.
Ante, 371.

Judgment was given for the plaintiff. It was agreed this would not have bound assignee, being for a new thing, without expressly naming him (a).

SECONDLY, That the plea was a negative pregnant.

(a) See Spencer's case, 5. Co. 16. Curcott v. Green, 1 Salk. 199. St. Sa-
Cookson v. Cook, Crp. Jac. 125. Dean viour's v. Smith, 3. Burr. 1271. 1. Black-
and Chapter of Windsor's case, 5 Co. 24. Rep. 351.

Anonymous.

Cafe 644.

PER CURIAM. If a *certiorari* go to remove a record, the Judge below is not in contempt for proceeding on the record till service of the writ, but all proceedings upon it after the *certiorari* tested are void.

Certiorari stays proceeding from the *teste*, but the contempt only from service.

* [385]

* Anonymous.

Cafe 645.

PER CURIAM. Payment to sheriff upon a *capias ad satisfaciendum* is not good to discharge the plaintiff's debt; and so adjudged and settled in the *Sheriff of Wiltshire's Case*.

Payment to sheriff on *ca. sa.* not good.
Ante, p. 230.

Anonymous.

Cafe 646.

ONCE a *poslea* is brought into court, though the plaintiff take it out again, yet it remains in possession of the Court, and the officer of the Court may command the plaintiff to bring it in; and the defendant may give the plaintiff notice to bring in a *poslea* in order to move in arrest of judgment.

A *poslea* once brought in is always under the controul of the Court.

Anonymous.

Cafe 647.

PER CURIAM. After exception against bail they must justify themselves, or plaintiff must withdraw his exception, before he can proceed to trial, so as to charge them.

Bail

Siliard

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Case 648.

Siliard *against* Cox.

If a man who has houses in different dioceses die in one, that intitles the ordinary of it to grant administration, if he has not *bona notabilia*.

AN *assumpsit* was brought by an administrator; a plea in bar, that the intestate died at such a place in another diocese than that from whose ordinary the administration was committed to plaintiff, and was inhabitant there at the time of his death.

Upon demurrer,

Judgment for defendant: for if a man has two houses in divers dioceses, his dying in one of them without *bona notabilia* in the other, intitles the ordinary of that diocese to administration; otherwise if he were on a journey, and so died.

Case 649.

Crow *against* Brown.

Usurious contract pleaded in bar of debt on a bond.

A USURIOUS contract was pleaded in bar to debt upon a bond, but it was not said that the defendant was indebted to plaintiff at the time the bond was given, or that there was an agreement to lend money upon the usurious contract; and for that judgment was given for the plaintiff.

Case 650.

Anonymous.

Legatee admitted to prove assets in the hands of executor, on a suit by a creditor.

PER HOLT, *Chief Justice*, at *nisi prius*. I have known it ruled, that a legatee should not be a witness to prove assets in the hands of an executor in debt by a creditor; and it has been an old exception, but I see not the reason of it, for he swears to lessen the assets, and one creditor may be a witness to prove assets in an action by another creditor. And the legatee was sworn.

* [386]

Case 651.

Physician in London fined and imprisoned *pro mala praxi*, by consent of the College of Physicians.

* Doctor Grenville *against* The College of Physicians.

IN trespass the plaintiff declared, that J. S. &c. did at such a place, &c. assault, beat, and wound him, and imprisoned him for seven days.

S. C. Salk. 144.
200. 263. 396.
S. C. 3. Salk.
265. 354.
S. C. Carth.
421. 497
S. C. Comy.
Rep. 76.
S. C. Ray. Eq.
417.
S. C. Holt, 184.
395. 536.

To which there was this special plea: **FIRST**, As to the *vi et armis*, and wounding, "Not guilty." **SECONDLY**, As to *residuum transgressionum*, they pleaded the charter of incorporation of 10. Hen. 8. and the act of parliament of the fourteenth year of the same king, confirming the said letters patent, by which the physicians of London were created a body politic and college, and to have four censors to examine physick within London and seven miles round it; and that those censors should be four in number, to be chosen by them yearly to have censure and examination of drugs and practisers of physick within the district aforesaid, and power to punish as charter directs at large. Then they further plead the statute of *Pbilip and Mary*, by which all

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all gaolers are commanded to receive into their custody all prisoners committed by them; that the plaintiff was a practitioner of physick in *London*, and on such a day and year of the king did take upon himself to cure the wife of *A.* for forty shillings to him in hand paid; that he did administer such unwholsome and noxious pills to her, that she became incurable, and so in manifest danger of her life, occasioned by such his physick; that the four persons in the declaration were duly chosen censors; that complaint was made to them by *A.* the husband for the said offence; that he was summoned to appear, &c. to be examined by them such a day; that he did appear, and that they proceeded to examine him; and upon the testimony of several witnesses, and hearing what he could say for himself, they the said censors judged him guilty of the said ill practice, and imposed a fine of twenty pounds upon him, and imprisonment for twelve weeks without bail or mainprise, unless sooner released by the master and president of the college of physicians: that they four did, by a precept in writing under their hands and seals, command *J. S.* the other defendant, to take and deliver him to the keeper of the gaol of *Newgate*; by force of which warrant he the said *J. S.* did so, and that the keeper kept him in gaol for the time in the declaration.

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To this there was a replication, that the plaintiff is a physician, and was so at the time of the supposed offence committed; and PROTESTANDO * that there is no such charter, and that he is not an unskilful physician, and that no complaint was made by the husband, and no judgment by the censors; for plea saith, that *de injuriâ suâ propriâ* he made the assault, &c. ABSQUE HOC, that he did it by virtue of the said warrant.

* [387]

And upon demurrer, *per* HOLT, Chief Justice, TURTON and GOULD, Justices, after many arguments, and great consideration, judgment was given for the defendant.

HOLT, Chief Justice, delivered their opinion thus:—Though much has been said to maintain the replication, yet there is no colour for it. It was objected that there was a good traverse of the warrant, but that cannot be, for there was a warrant granted and pleaded, and the plaintiff was taken by virtue of it; and he denies his being taken by virtue of it, but does not traverse the being of a warrant, for that had been a good traverse. Suppose one has a legal and an illegal warrant, and arrests by virtue of the illegal warrant, yet he may justify by virtue of the legal one; for it is not what he declares, but the authority which he has is his justification. I suppose the plaintiff means by this replication, that the defendant arrested him by virtue of some other authority, and not by the warrant that is pleaded; but then his way had been to induce his traverse by shewing that other authority, and then to traverse, not as here, ABSQUE HOC, that it was by virtue of the warrant pleaded, but to say that the defendant arrested him by virtue of the other authority, ABSQUE HOC, that he had the warrant

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warrant pleaded at the time of the arrest : So, instead of traversing the *virtute warrantis*, he should have pleaded the being of the warrant at that time. 34. *Edw. 1. Fitz. "Avovery"* 332. 3. *Co. 26.* If one distrain for an unjustifiable cause, yet when he comes to avow, he need not insist on the cause for which he had distrained, but may justify for any lawful cause, as for rent arrear, though he distrained for some other cause ; and the cause, for which the distress in truth was, is not traversable, but *riens arriere* is the proper plea.

College of Physicians have jurisdiction over the person of a physician as practiser.

THE SECOND POINT was, Whether the defendants have sufficiently intitled themselves to a jurisdiction to condemn the plaintiff ? And this were a most material objection, if true ; but it is most apparent they have done it by setting forth their charter, confirmed by act of parliament ; by which they have a jurisdiction over his person as practiser of physic, especially if he practise ill. SECONDLY, They have jurisdiction over his practice. THIRDLY, The fact which they punish is within the limits of their jurisdiction, *viz.* in *London*, and * their jurisdiction extends seven miles round ; and this jurisdiction is to be exercised by those that are censors of the college, which they are shewed to be.

* [388]

Mala praxis is not traversable.

THE THIRD OBJECTION is, That it is apparent this charge of mal-administration of physic is traversable ; and therefore ought to be sufficiently alledged, as issue might be taken upon it ; and for this is quoted *Dr. Bonham's Case* ; for if it be not traversable, the party committed would be without remedy, for writ of error lies not. But to this we answer, FIRST, That notwithstanding the opinion in *Dr. Bonham's Case*, the matter is not traversable. SECONDLY, That if it were traversable, issue might be taken upon it here. THIRDLY, If the plea were defective in that, yet it would not intitle the plaintiff to his action. FIRST, The fact is not traversable ; and that appears from the nature of this authority ; for it is an absolute power given to them to hear and determine such offences ; and thence it does necessarily follow, that the matter is not traversable ; and he shall never arraign their judgment, but is finally convicted and concluded by it ; and such as

Where power is given to hear and determine, the matter is not traversable.

Where persons are made judges, or liable to action of party for what they do as judges, shall not be criminally accused, or liable to action.

are by law made judges of another, shall not be criminally accused, or liable to action of party for what they do as judges. 43. *Edw. 3. 9. 9. Edw. 4. 3. 12. Co. 26.* Now, that they have such a judicial power by their charter is plain ; for they are to examine all mal-administration of physick, and to give judgment thereupon ; and what is that but to hear and determine ? But some indeed have power to imprison by law, who do not do it by way of punishment, but by way of prevention ; as a constable may

Constable may imprison by law to prevent a fray, but therein does not act as judge ; and there action may lie.

commit one to prevent a fray ; and therefore, because he does it not as judge, if he does it *malitiose* action will lie against him for it ; and there are other ministerial commitments, as by justices of peace. commissioners of bankrupt, &c. for which action may lie. But in this case the censors have power to examine them for ill practice, and to convict and punish them for the same by fine and imprisonment ;

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imprisonment; and this makes them judges of record; for wherever there is a power *de novo* erected by parliament to convict, and fine, and imprison, either of those two make it a court of record (a). Leet can fine, but not imprison. 8. Co. 61. *Nulla cur. quæ recordum non habet, potest finem imponere, nec aliquem carceri mandare, quia ista spectant tantummodo ad curias de recordo*; therefore these censors, having a power to fine and imprison, of necessity are judges of record, and their court is a court of record. 10. Co. 103. Discourse upon the statute of *Westminster the Second*, c. 11. concerning auditors to account; * before that statute, if one had accounted before auditors, and were found in arrear, and debt were brought for the arrears, the defendant might have waged his law, but he cannot since the statute; and why? There are no words in the statute to take away the wager of law, save only, that if the party be found in arrear before auditors, they shall commit him; but the reason is, that by giving the auditors power to commit by the statute, by necessary consequence the auditors are made judges of record; and therefore there shall be no wager of law against their proceedings. And if such a power makes them judges of record in that case, why not in ours? 2. *Inst.* 280. Auditors to account are allowed to be judges of record; and this surely is an authority in point for us. Then if the censors in this case are judges of record, the consequence is very strong, that no act of theirs, which they do as judges, is traversable; and no averment receivable, that a judge of record has acted against his duty. 47. *Edw.* 3. pl. 50. 1. *Hen.* 6. pl. 4. 7. *Hen.* 6. pl. 13. pl. 85. 12. Co. 22. 27. *Aff.* pl. 18. A judge of *oyer and terminer* was indicted, for that he being a Judge, and one being indicted before him for trespass, he made up the record to be for felony; and adjudged the indictment did not lie, and it was quashed; and that it should never be averred but that it was for felony; nor could a Judge be supposed guilty of such an offence. And as to my Lord Coke's saying in *Doctor Bonham's Case*, we say it was but *obiter*, and not pertinent to the case; for there the commitment was for practising without licence, and not upon the clause now in question; and there they ought to have sued in the courts of *Westminster Hall*, and not commit him; and so what my Lord Coke says is no judicial opinion: Besides, he seems to have been under some transport, because *Doctor Bonham* was a graduate of *Cambridge*, his own mother university. And he himself afterwards, in the same case, does say, that if the censors do convict a man for such offence, they ought to make a record of it; and that they cannot do, unless they are judges of record; and then we say their proceedings are untraversable, and they unpunishable for what they do as judges.

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Vide Sav. 83.
Sav. 115. cont.
Wherever there
is power to im-
prison and fine,
are courts of re-
cord.

* [389]

Since by statute
auditors can
fine, are judges
of record, and
therefore wager
of law will not
lie.

Against the act
of judges of re-
cord, no aver-
ment that they
have acted a-
gainst their du-
ty.

Persons are un-
punishable for
what they do as
judges.

A FOURTH OBJECTION is, That there is another reason why this must be traversable, because the party has no other remedy;

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* [390]

Error will not lie
on a new created
jurisdiction, un-
known to com-
mon law ;
but may have
certiorari.
Vide ante, 146.

2. Vent. 66.
Orders of Sew-
ers removable
B. R.
Postea Trin.
12. Will. 3.
Dom. Regina v.
Inhabitants de
Glammorganshire.

* [391]

for he cannot have a writ of error. To this, FIRST, we answer, The party is not without remedy, and that as good as a writ of error. And SECONDLY, Suppose he had no * remedy; yet that would be no reason why he should of necessity have leave to traverse. And as to THE FIRST, I agree, a writ of error does not lie; because it is a new way of proceeding unknown to the common law, and not according to its rules. For they need not proceed pursuant to the methods of law, nor need they indictment or jury; nor in their judgments say, *ideo consideratum est*; but may say, they judge him guilty, and that he ought to pay so much money, &c. And it is like the case of convictions by justices of peace; and in both cases I hold, the party has a good remedy by *certiorari*; and that is a consequence necessary on all such particular jurisdictions, that the record of their proceeding may be brought up hither, that this Court may examine whether they have kept themselves within their jurisdiction. 3. Cro. 489. *Long's Case*; he was found guilty of felony, and burnt in the hand; and held a writ of error could not lie, because no judgment of attainder, but that it might be removed by *certiorari*; and so it was; and, for faults in the conviction, quashed, and the party restored to his goods and chattels. We do take it, that where a court in its nature is a court of record, a *certiorari* will lie to it, by reason of the great superiority of this Court (a); which may command them to send their proceedings before them up hither, that it may be seen whether they confine themselves to their jurisdiction; which if they exceed, this Court may correct them; and how comes it to be granted upon convictions by justices of peace, or orders of commissioners of sewers? I remember formerly the commissioners of sewers were advised by Counsel not to obey *certiorari*'s, but they were all laid by the heels for following such advice, and obliged to obtain the king's pardon for the offence. And *Mr. Callis*, upon his reading upon the statute, holds, that their orders are removable hither by *certiorari*. Indeed we are so cautious often to deny it, lest in the mean time the country should be overflowed: But the general reason of the law is, that wherever a jurisdiction is set up by act of parliament to make convictions, &c. *certiorari* will lie to remove them; as in case of forcible entries. And the Court is to examine, as far as appears on record, that they have not exceeded their authority; and if they have not, or not pursued the act, to quash the proceeding — As to THE SECOND, Suppose there were no remedy, it would not follow from thence that these proceedings are traversable, because the act has given them a power, and has given the * party no remedy; for the not giving an appeal from them, or the making their judgments irreverfable, shall not alter the nature of a court of record. And if the statute gives them too great a power, who can help it? That there lies no appeal is a strengthening rather

(a) See 1. S. r. 609. Cowp. 524. 836. Dougl. 534. 2. Black. Rep. 233.
3. Hawk. P. C. 7th edit. ch.

than

than a weakening of their authority. And this appears by many authorities; as if a verdict be given by a jury in a criminal cause, or if in such a case the Judge misdirect the jury, or tell them the law is otherwise than it is; as that killing a man in his own defence is murder, and the jury should find it so; there is no remedy. There has been an old star-chamber law that a jury might in such case be attainted (a); and a Judge has been brought into the star-chamber for making a false return; but adjudged it could not be. And heretofore a jury has been fined for giving a verdict against evidence. 2. *Leon.* 233. *Noy*, 48. *Yelv.* 23. *Mo.* 130. But see *Bushe's Case* (b); where it was held by all the Judges of *England*, except one, that a jury could not be fined for giving a verdict against evidence, because they are judges of the fact; and therefore, by the same reason, the defendants here, being judges of the matter, shall not be liable to action for their judicial act. 3. *Cro.* 309. I. a civil action, if the Judge direct the jury that the law is otherwise than it is, and they find according to directions, yet attain lies not: Yet there the parties are without remedy; therefore it would not follow in our case, because there is no other remedy, therefore the matter is traversable; and that either in civil or criminal matter. And though the plaintiffs have no jury here, yet that makes no alteration; for if they have power to convict, fine and imprison by the statute, they are judges of the matter. 7. *Hen.* 6. *pl.* 13. there is a diversity between a fine and an amercement; if a fine be imposed, it is not traversable, but an amercement is. No action will lie against a bailiff for awarding a process upon a presentment. What then remains in this case? For if, as long as the verdict of a jury stands, it cannot be traversed; why when the same authority which the jury had is vested in a Judge by act of parliament, why, I say, shall it be traversable? and can any man give a reason of a diversity between the cases? for if the parliament has given the censors the power of a jury, they must give the consequences of that power. And the case of *Hammond v. Howell* (c), in this court, in the twenty-ninth year of *Charles the Second*, is as full as can be in point: An indictment was found against some persons for going to *conventicles, and the jury would not find them guilty upon evidence; whereupon they were fined and committed; and upon a *habeas corpus* to the common pleas, it was resolved the jury could not be fined for not going according to evidence, and they were discharged. And then they brought an action of false imprisonment against *Howell*, who pleaded, that he was a Judge of *oyer* and *terminer*, &c. and held no action would lie, because it did appear he was a Judge of record; though it was plain, by the opinion of the court of common pleas, he could not fine them by law; yet for this very reason judgment was given for the defendant; and where is the diversity between that case and ours? They were both Judges of

DOCTOR
GREENVILLE
against
THE
COLLEGE OF
PHYSICIANS.

Jury cannot be
fined for verdict
against evi-
dence.

Vide 3. Inst. 63.
If ecclesiastical
commissioner
commit a man
against law, ac-
tion will lie a-
gainst him.

Fine and amer-
cement diffe-
rent.

* [392]

Action brought
against a Judge
of *oyer* and *termi-
ner* would not
lie.

Postea, Trin.
12. Will. 3.
Rook v. Sheriff
of Salisbury.

(a) Vide *Floyd v. Barker*, 12. Co. 24.
(b) *Vaugh.* 135.

(c) 1. Mod. 129. 124. 2. Mod. 218,

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DOCTOR
GREENVILLE
against
THE
COLLEGE OF
PHYSICIANS.

record, both had power to fine and commit, and shall the one be punished and not the other, though they act against law? And as I have said before, the censors have power over the plaintiff's person, and why shall not judges created by act of parliament, have the same protection as any other Judges whatsoever? I might have enlarged much more upon this head, but fear I have been too long already; and perhaps I may be sorry to have occasion to say so much, for some may abuse it.

Action against
commissioners
of excise, for
making one pay
duty for strong
waters for what
was not, laid,
because exceed-
ed their duty.
Poitea, Trin.
12. Will. 3.
Dom. R. v. In-
habitants de
Glamorganshire.

THE FIFTH OBJECTION. *Hard. 480.* Trespass was brought against the commissioners of excise, who convicted one for not paying duties for strong waters; and the jury found, that the liquor was low waters from which the spirits were extracted, and it was held the action did lie; and what was the reason? Because they exceeded their duty; for their authority only extended to take excise of excisable liquors; but here the College have a jurisdiction over the person. And in case a justice of peace convicts one for having a bastard child; and if so be the child be a bastard, he is concluded, but if it be not, it is not his calling him one will make him so; and therefore the party is not without remedy, for all was *coram non judice*; so it is not the commissioners of excise's calling "low waters" "spirits," will make them so: and this is the reason of that judgment; for if it were admitted that they had jurisdiction, there would be no remedy. SECONDLY, And suppose it were traversable, it is certainly enough alledged here, so that issue may be taken upon it; for it is said, he took upon himself to administer physic to the woman, and he gave her very hurtful and unwholesome physic, whereby she became worse and worse, and incurable.

* [393]

• THE SIXTH OBJECTION is, That it does not appear what sort of physic it was. And what then? If they had mentioned it, would we be anything the wiser for it? for we must try it at last by a jury, and take the opinion of physicians in it; and if an action be brought against a physician, or against a surgeon, it will be enough to say, that he unskilfully and inartificially did apply his cure; and the rest may come in evidence.

THE SEVENTH OBJECTION is, That it is not said what disease she had. Suppose she had none at all, that would make the matter worse.

For HOBT: It
seems oenfort
may tender oath,
in consequence
of their jurisdic-
tion.

THE EIGHTH OBJECTION is, That it does not appear the witnesses were sworn. I shall answer, FIRST, It may be a question, Whether they ought to be sworn? And it seems to me, they may tender an oath, as a necessary consequence of their judicial power; but I will give no positive opinion. SECONDLY, Suppose they could administer an oath, and will not do it, or *vice versa*, it would only make their proceedings erroneous, and then ought not to be arraigned for it. And though the plaintiff be not one of the College, yet, if he practise physic within their jurisdiction, he ought to subject himself to the law, as well as any other.

Though practi-
tioner be not a
physician, prac-
tising makes
him liable.

And judgment was given for the defendant.

The

Easter Term, 12. Will. 3. 1a E. R.

The King *against* Somerton.

Cafe 652.

AN ORDER OF ADJUDICATION of the reputed father of a bastard was ruled bad for two faults: One justicemust be of the *quorum*.

FIRST, It did not appear that one of them was of the *quorum* (a).

SECONDLY, Nor that the examination was by them both (b); Both justices must be present and either held fatal.

tion of a pauper.

But because the defendant was not present in court, as he ought to be, it was only quashed, *nisi*. Reputed father must be present.

6. Mod. 180. 2. Salk. 475. 1. Bl. Rep. 198.

(a) But now by 26. Geo. 2. c. 27. no order shall be quashed for this exception. See S. P. post. 419.

(b) See *accord*. Anonymous, post. 403. Rex v. Wykes, 2. Stra. 1092. Rex v. Ware, 2. Salk. 488. Rex v. Coin St.

Aldwins, Burr. S. C. 136. Rex v. Howarth, 2. Conit P. L. 769. Rex v. West, 6. Mod. 180. Billing v. Prince, 2. Black. Rep. 1017. Rex v. Forrest, 3. Term Rep. 38. and Rex v. Statfold, 4. Term Rep. 596.

Anonymous.

Cafe 653.

JUDGMENT was upon the return of two *nibils* to a *scire facias* reciting a judgment in the King's time, when in truth it was a judgment of the time of the King and Queen, and so no judgment to warrant the *scire facias*, and money levied by virtue of this judgment. citing a judgment obtained in the reign of one king, as in the reign of another, is bad.

PER CURIAM. In strictness the defendant ought to be put to his *audita querela*; but we do often give relief upon motion.

And the judgment on *scire facias* was set aside, and restitution awarded.

* [394]

* ——— *against* Cutts.

Cafe 654.

ATRIAL AT BAR was to be concerning the right of members of a corporation; and it was moved on one side, that the town-clerk should attend with the corporation-charter. On the trial of a corporate right, the other party may have an inspection of the charter.

PER CURIAM. Of right you are not intitled to that, because you may have a copy of it at THE ROLLS (a). But it being merely to try the right, it was thought hard to put them to the charge; and the clerk was ordered to attend at the charge of them that made the motion. If tenant claim by copy, the lord, on motion,

(a) See post. Anonymous, 414.

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against
CUTTS.

is only ordered to let him have sight of the court-rolls, but not to bring them into court (a).

(a) See *Crew qui tam v. Saunders*, 2. Stra. 1005. *Slade v. Walter*, 12. Vin. Abr. 146. *Geary v. Hopkins*, 2. Ld. Ray. 851. 7. Mod. 127. *Richards v. Patterson*, Comy. Rep. 555. *Rex v. Hollister*, B. R. H. 245. *Warner v. Giles*, 2. Stra. 954. *Young v. Lynch*, 1. Black. Rep. 27. *Addington v. Clode*,

2. Black. Rep. 1030. *Folkard v. Heynet*, 2. Black. Rep. 1061. *Rex v. Shelley*, 3. Term Rep. 141. But see further on this subject Mr. Nolan's note to the case of *Rex v. The Fraternity of Hostmen in Newcastle*, 2. Stra. 1223. where all the cases are collected.

Case 655.

Freeman against Bluet.

An immediate officer of a court cannot justify under a returnable process without shewing a return; aliter of those who act under him.

S. C. 1. Ld. Ray. 632.
S. C. 1. Salk. 409.
S. C. 3. Salk. 230.
S. C. Holt, 408.
Lane, 52.
Moor, 57.
Latch, 223.
Cro. Eliz. 17.
Cro. Car. 447.
Salk. 408.
Stra. 1184.
Cowp. 18.
2. Will. 5.

TRESPASS for entering into the plaintiff's house, and taking away such and such his goods.

The defendant pleads, that *London* is an ancient city, &c. and that time out of mind there was a court of record there *test. coram alterutro* of the sheriffs, which had a jurisdiction of all trespasses, replevins, &c. arising within the city; that before the time mentioned in the declaration, viz. such a day, &c. *A.* came to the said court, &c. and there before the sheriff levied a plaint in a plea of taking and detaining goods, against the plaintiff, and found security to prosecute it, and re-deliver the goods if judgment should go against him; that *superinde* the sheriff, *ad tunc et ibidem*, did issue a precept to the defendant, one of THE SERJEANTS AT MACE to the said court, commanding him to replevy the said goods, and make a return to the said precept; that he accordingly did replevy them, &c. and delivered them to *A. quæ est eadem transgress.* &c.

To which plea the plaintiff demurs.

* [395]

IT WAS ARGUED for the demurrer the plea was naught, for want of a return according to the command of the precept; for whoever justifies by a writ or precept, must shew his compliance with all its commands, without which he cannot take advantage of it (a). If an officer take the goods of an outlawed person, and make no return, the party, upon reversal of the outlawry, shall have trespass against him for his goods (b); for he was to have done two things, one for the advantage of the plaintiff, * and the other for that of the defendant; and he shall not justify the one without the other. And here the plaintiff ought to have the advantage of the return, which the defendant deprives him of by making none. It is true, in an escape the defendant shall not take advantage of the want of a return, because his own wrong: And one that acts under the officer in this case shall justify without a return, because it was not in his power to make one: But here it is the officer himself, who could and ought to make a return, that would justify without it: and an escape would lie against this serjeant upon ex-

(a) See Year Book 20. Hen. 7. pl. 13.

(b) Year Book 21. Hen. 7. pl. 22.

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ecution of a process of that court; but if it were upon the execution of a *latitat*, or other process out of the courts of *Westminster*, it would not lie against him, but against the sheriff. 1. Roll. Abr. 806.

FREEMAN
against
BLUET.

THEN there is no such court as they have set forth, for they say it is a court held *coram alterutro* of the sheriffs; and the truth is, they have two distinct courts, and one of them cannot act in the court of the other; but as to the courts of *Westminster*, they both make but one officer. *Trinity Term*, in the second year of *William and Mary*, escape lay against them both for an escape out of THE COMPTEER, of which they both make but one keeper. And their being Judges does not hinder their being keeper too; as the mayors of many corporations are both. *Ray*. 83. Vide ante, 137, acc.

DEB, *on the other side*. A serjeant at mace is but an under-officer, and such is not liable to an action for what he does by warrant of a court. Debt was upon a judgment, and pleaded that the plaintiff sued out a *feri facias* upon that judgment, and the money was levied by virtue thereof, and paid to the plaintiff; and there it was said at the Bar, that it was no plea, without shewing a return, because the judgment being matter of record ought not to be avoided but by matter of as high a nature; but the Court gave no opinion (a). The sheriff is not excusable by virtue of a *feri facias*, without a return (b), for that commands him to have the money in court; but he may justify by virtue of an *elegit* without a return: *Quod HOLT negavit*. The party has no injury done him for want of a return; for if the plaintiff in the replevin discontinue, he has his goods again: and for precedents of justification in replevin without a return, he cited the *Old Ent.* 136. 159. 162. *Rass.* 688. 669. *Co. Ent.* 333. and he put this diversity, that where the command of the writ is to deliver to the party that sues it, there needs no return; otherwise * where it is to have it in court; and the sheriff without a *venditioni exponas* may sell upon a *feri facias*.

* [396]

HOLT, *Chief Justice*. Till process returned, the escape of a prisoner in that court would lie against THE SERJEANT, but after return it lies against the sheriff. And as to the objection, that the court is laid to be held *coram alterutro*, that may be well, and taken severally, and I believe originally they were one joint court, but severed by partition, and THE HUSTINGS in truth is the county court of the city; and wherever the sheriff justifies by virtue of a mesne process, he ought to shew a return. There is a diversity in the case in the Year-Book of *Henry the Seventh* before put; when the sheriff is by the writ commanded to have the party in court, there he ought to make a return, but he need not do it in judicial process, for then he is only to keep him until he makes satisfaction.

(a) Year Book 11. Hen. 4. pl. 58.

(b) Vide 4. Edw. 3. pl. 2.

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FREEMAN
against
BLUNT.

And PER TOTAM CURIAM in *Hilary Term* following: The plea is clearly bad, for want of shewing a return (a), for the precept is returnable, and commands a return; and in all *capias's ad respondend.* or other mesne process to the sheriff, if trespass or false imprisonment be brought against him for executing them, he cannot justify without shewing a return: The diversity is between the immediate officer of a court to whom the writ or mandate is directed, and one that acts under him; for if he be no officer of the court, but acts under him, he may justify without shewing a return (b); otherwise of sheriff or other immediate officer; for he, that has not shewed to the Court that he has done his duty in what the process of the court required him, shall not be justified by the process. *Vide* 38. *Hen.* 6. and many other Books. And the case of replevin is much stronger; for where a plaint is levied in replevin, there is a precept made thereupon to replevy the goods; and if they be replevied, what shall the defendant do if there be not a return? It is true, he has a day on the roll to appear, and perhaps demand the plaintiff; yet if he do not appear on the return of the precept, whether the replevin be good or not, the Court cannot know what judgment or process to award; whereas if return be made, and a particular of the goods given, and the defendant comes and makes title, he shall demand the plaintiff, and have judgment *de returno habendo*; but if the replevin be adjudged good, the plaintiff shall have judgment and costs; or if the return be an *elongat.* the Court shall award a *withernam*; or if the party be non-suit, there shall likewise be a *returno habend.* If the replevin be executed and justifiable, judgment shall be for the plaintiff; and in order to these things there must be a return. The first replevin and *alias* indeed are not returnable, but are warrants to the sheriff to replevy, and in nature of a *justicies*; and therefore one may justify by virtue of them without a return. But the *pluries* is returnable, and therefore, if the sheriff will justify by it, he ought to return; otherwise one should have no means to have his goods again; and all the cases that seem against this are of inferior officers. And in case of original replevin to sheriffs, which is not returnable, but a *justicies*, the sheriff's precept to his bailiff to summon in the defendant is returnable, and gives them day in court.

1. Cro. 446, 447.
1. Jo. 378, 379.

Postea Mich.
12. Will. 3.
Moor v. Watts.

* [397]

Replevin and
alias is not re-
turnable, but
the *pluries* is.

And so by THE COURT judgment was given for the plaintiff.

(a) Same point Cotes v. Mitchell,
3. Lev. 20. Britton v. Cole, Salk. 408.
Middleton v. Price, 2. Stra. 1184.
1. Will. 17.

(b) See Bull. N. P. 23.

Case 656.

— against Farrell.

In trover the
thing itself may
be brought in.
Ante, 90. 95.
187, 188. 241.

BRODERICK moved, that the defendant in trover after declaration might bring the thing itself and deliver it to the plaintiff.

And
111

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And GOULD, *Justice*, said, he had known it often done; other-
wise where he would tender *the value*, for the defendant shall not
set a value upon the plaintiff's goods.

—
against
FARRER.

And the motion was granted (a).

(a) See Cooke v. Holgate, Barnes, Prince, 3. Burr. 1363. Whitten v.
281. Roydon v. Batty, Barnes, 284. Fuller, 2. Black. Rep. 902.
Anonymous, 1. Stra. 142. Fisher v.

Anonymous.

Case 657.

HOLT, *Chief Justice*. If a *pension* be by prescription out of
a rectory impropriate, though the rectory come into lay hands,
yet it may be sued in the spiritual court, because it might have
commenced by a spiritual act (a); and if such a prescription be
denied, it shall be tried there; but if a *modus decimandi* be plead-
ed, it shall be tried at common law; and if it be not found, a con-
sultation shall go.

Pension may be
sued for in the
spiritual court.
Post. 404.

(a) Ante, 260. 326. Stone v. Jones, post. 404. Johnston v. Ryson, post. 416.

Anonymous.

Case 658.

HOLT, *Chief Justice*. FIRST, If a distress for *damage feasant* die
in the pound or escape, the party shall not retake them; but
if it were for *rent*, in either case he may distrain *de novo*.

If distress for
rent escape or
die, distress
may be *de novo*;
aliter if for *damage feasant*.

SECONDLY, Escape of cattle out of a pound is not like the
escape of a prisoner out of gaol; for if the pound be not good, the
distrainant may be his own keeper, and put them in his own pound,
but he cannot be keeper of his prisoner.

Distrainor may
keep the dis-
trains.

THIRDLY, Every pound-keeper is the servant of him who im-
pounds the cattle, *pro hac vice*.

Pound-keeper.

* [398]

* Anonymous.

Case 659.

HOLT, *Chief Justice*. It is a great misdemeanor in an attor-
ney to take a warrant of attorney to enter judgment on a
bond without a defaultance; and none but a sworn attorney can
take such a warrant.

Warrant of at-
torney to con-
fess judgment.

The King *against* The Inhabitants of Kirford.

Case 660.

AN ORDER of two justices was to remove a man, with his wife
and family, and it was quashed *in toto*, because the family
might have another settlement; so it would be if the order were to
remove him and children (a).

Order to remove
a man and his
family, ill.

(a) See Rex v. Chichester, 2. Seff. Sett. & Rem. 45. Rex v. Johnston,
Cafes, 72. Chewton v. Compton Mar- 2. Salk. 485. 2. Const. 773. Hobey
in, 1. Stra. 471. Reg. v. Newington, v. Kingbury, 1. Stra. 527.

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Case 661.

Anonymous.

Information for making a wharf contrary to a private act of parliament.

AN ACT OF PARLIAMENT was for making a river in *Derbyshire* navigable, and that none should build any wharfs upon it from henceforth; and one having afterwards built a wharf, another, who had a former, and prejudice in the advantage thereof by the second wharf, moved for leave to file an information (a) against him upon the statute.

And though THE COURT said it was not an act of so public a nature, as that the Court ought, *ex officio*, to take notice of it; yet because it was for public good, and the matter directly against it, they gave leave to file an information; but they held that an information would not lie for the violation of a private statute.

(a) NOTE. At common law informations might be filed without motion, in the name of the Master of the Crown-office; but since the statute of 4. & 5. Will. 3. Mary, c. 18. it cannot be with-

out leave of the Court; and that to avoid frivolous and vexatious matters; and that the party, in case of acquittal or nonsuit, have costs.—NOTE to former edition.

Case 662.

Badger against Floid.

Person who has judgment in ejectment may bring debt for rent, notwithstanding writ of error pending.

S. C. Holt, 159.

* [399]

THE PLAINTIFF had judgment in ejectment, of which error being brought, and bail given to prosecute, and answer the mean profits; and pending it, the plaintiff brought debt for rent.

And PER CURIAM, The writ of error does not hinder the plaintiff from bringing debt, or distraining for his rent; and here he might have entered without a writ of execution, and only all executions by writ are suspended by the writ of error: and in a real action, after judgment, the plaintiff may enter notwithstanding the writ of error, if his entry were lawful without the judgment; for that is not by force of the judgment, which shall not put him in a worse condition than he was in before. And whereas it was urged, that in the exchequer they had laid a plaintiff by the heels for such a thing, HOLT, *Chief Justice*, said it must have been by virtue of their equitable power, which this Court had not.

Case 663.

Anonymous.

Covenant to convey all his right; no plea to say had none.

1. Saund. 216.

Postea, Mich.

12. Will. 3.

Hammond v. Ouden.

HOLT, *Chief Justice*. If *A.* covenant with *B.* to convey him all his right and title to the manor of *D.* to which *A.* has no right; it is not a good plea in an action of covenant, that he had no right, &c. but he must make such a conveyance, as would in truth pass all his title, in case he had any; and he is estopped by his covenant to say he had no title.

Basse

Basse *against* Bellamount.

Cafe 664.

HOLT, *Chief Justice*. If the king grant a tract of land in the plantations abroad to a man, with a legislative power, which the grantee passes over to another, the legislative power shall not pass as a privilege annexed to the land, but that remains with the person of the grantor.

Grant of legislative power not transferable.
S. C. Holt, 338.

Rosiere *against* Sawkins.

Cafe 665.

TRESPASS by a master for the battery of the servant, *per quod servitium, &c.* The defendant pleads *actio non*, because it did not appear that he was his servant at the time of the battery committed, concluding with a *petit judic. de billa, et quod billa cassetur*.

Billa and *narratio* are the same in B. R.
S. C. post. 434.
S. C. Holt, 460.

And, Whether this were made a plea in abatement by the conclusion? was the question.

HOLT, *Chief Justice*. We must discourage these sort of pleas, and *billa* and *nar.* are the same thing in this court; and therefore one may demand judgment *de billa*, and alledge insufficiency in the declaration; and though such a plea as this ought not to be received, yet since it has been received, there is no harm to award a *responseas ouster*, for the defendant cannot assign it for error, because for his advantage; and yet we may justify to give final judgment: And so was the rule.

5. Co. 39. b.
8. Co. 59. a.
Owen, 33.
7. Co. 4.
2. Saund. 48, 47.
Dy. 38.

Anonymous.

Cafe 666.

LOCAL ACTION not to be laid anywhere but where it did arise, without consent of the parties. *PER CURIAM*.

Local action to be laid where arose.

* Lady Faulkland *against* Stanjon.

* [400]

Cafe 667.

IN DEBT UPON A BOND, it was pleaded in bar, that in a former action upon that bond the defendant had pleaded the late statute of the king laying taxes upon bonds for security of money, and that none should recover such debts if they had not taxed the same; and that upon that plea the plaintiff was barred.

If a statute enact that no bonds unstamped shall be recoverable at law, and after the statute is expired an action be brought on an unstamped bond, made while the statute was in force, the defendant may plead the statute, though expired, in bar of such action.

It was objected, that the statute was only a temporary law, and now expired; and therefore the impediment being removed, the plaintiff should recover; and compared it to the case of excommunication pleaded, where the judgment is *remaneat loquela sine die quousque, &c.* which is but a temporary plea, by which the parties are put out of court, but may be brought in by a re-summons or re-attachment; but where outlawry is pleaded in abatement, after pardon or reversal thereof, the party must begin *de novo*.

But

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LADY
FAULELAND
against
STANION.

But by **HOLT**, *Chief Justice*, Here the defendant had a good plea when the first action commenced, and time shall not wear it out; and he said, that *Co. Lit.* 128. b. and 135. b. is to be understood upon this diversity, when the cause of action accrues to the plaintiff at a time at which he is under the disability of an outlawry; there the plea of outlawry in abatement shall quite overthrow the writ, and after removal thereof he must begin *de novo*; but where the disability of outlawry comes after the cause of action accrued, there the plea of outlawry is only a temporary disability which does not abate the writ, but is only *quousque*; and after removal thereof, he may re-continue the action by re-*summons*, &c.

Case 668.

Steer against Shalecroft,

Covenant to
convey at charge
of covenantee,
he must tender
the charge.

IT WAS COVENANT for not conveying an estate pursuant to articles.

S. C. Holt, 177.

HOLT, *Chief Justice*. There is a manifest difference between a covenant to make a conveyance at the charge of the covenantee, and a covenant to convey to the covenantee, and he covenants to be at the charge of it; for in the first case the covenantor is not obliged to perform the tender of the charges; but in the second he is to convey at his peril; and if the covenantee will not pay, he has his remedy against him upon his covenant; but where the covenant is to make the conveyance at the charge of the covenantee, the covenantor ought to *give notice to the covenantee, what sort of conveyance he intends to make, that the covenantee may judge what charge to tender.

* [401]

Deed must be
pleaded accord-
ing to its legal
effect.

SECONDLY, When one pleads a deed, he must plead it according to its legal operation, and not according to the words thereof.

Difference be-
tween a cove-
nant to be per-
formed before and
on such a day.

THIRDLY, If a covenant be to make a feoffment, &c. *before such a day*, the covenantor ought to give notice when he will make it, that the covenantee may be there to receive it; *secus*, if it be to make a feoffment *on a day certain*; but in that case the covenantor must plead a tender on the last convenient time of that day.

Case 669.

Anonymous,

How seats in the
church are de-
terminable.

PER CURIAM. All controversies concerning seats in a church are determinable before **THE ORDINARY**, except where one claims a seat by prescription.

Godb. 200.

2. Buft. 150. 2. Lev. 193. 241. 2. Roll. Abr. 238. 3. Inst. 202. Cro. Jac. 366. 1. Sid. 89.
3. Lev. 73. 1. Will. 326. 1. Term Rep. 428.

The

Easter Term, 12. Will. 3. In B. R.

The King *against* The Vill of Abingdon.

Case 670.

HOLT, *Chief Justice*. The reason why a return to a *mandamus* requires the utmost certainty the law allows of, is not only that the party may have sufficient to ground his action upon, if false; but to the end the Court may know what judgment to give upon it, in case it were demurred upon, and because it cannot be helped by pleading.

Return to a *mandamus* requires the greatest certainty. S. C. ante, 308. S. C. Salk. 431. 699. S. C. Carth. 499. S. C. 1. Ld. Ray. 559. Stra. 55. 640. 1112. Com. Dig. "Mandamus" (D. 5.).

The Bishop of Bath *against* Bridges.

Case 671.

IT was moved to change the *venue* in an action of *scandalum mag-natum*; but it was denied; for PER CURIAM, It is never granted but for extraordinary cause, as was that of my Lord *Shaftsbury* (a).

(a) *Shaftsbury v. Craddock*, 2. Jones, 2. Stra. 307. 1. Bat. K. B. 68. Lord 192. 1. Vent. 363. Skin. 40. 2. Show. Griffin v. Buckley, Barnes, 482. Gilb. 197. Duke of Norfolk v. Alderton, C. P. 90. Duke of Richmond v. Cof-tello, 12. Mod. 234. Salk. 668. Ante, 121. Rex v. Lee, post. 514. Lady Falconbridge v. Forrest,

Special cause is required to change the *venue* in *sc. mag.*

Anonymous.

Case 672.

HOLT, *Chief Justice*. If upon a general release, the releasee give the releasor a bill of exchange, note, &c. bearing even date with the release, the release shall not discharge them.

A release does not discharge a note given the same day.

TRINITY

TRINITY TERM,

The Twelfth of William the Third,

I N

The King's Bench.

Sir John Holt, *Knt. Chief Justice.*

Sir John Turton, *Knt.*

Sir Lyttleton Powis, *Knt.*

Sir Henry Gould, *Knt.*

} *Justices.*

Edward Northey, *Esq. Attorney General.*

Sir John Hawles, *Knt. Solicitor General.*

• [402]

Case 673.

* Jennings's Case.

Alderman may
surrender by pa-
rol.

S. C. 5. Mod.
421.

Hard. 476.
Dyer, 195.

IN *Sir Jonathon Jennings's Case* it was held *PER CURIAM*, that an alderman might surrender his office by parol; for since he may acquire that office without deed, *viz.* by election, *ex natura rei* he may surrender it without deed; for whatever may be acquired without deed may be surrendered without it. 1. *Inst.* 338. a. And it is incident to all corporations to be able to receive such surrender. And this judgment was upon return of a *mandamus*.

MULSO moved for a new writ, in order to bring surrender or not in question, the first writ being quashed as ill directed; and obtained it with difficulty to try the right.

Case 674.

Grabborn *against* Railer.

Warrant of at-
torney to confes-
sion judgment a-
mended long af-
ter.

WARRANT OF ATTORNEY was for confessing judgment as executor; and being entered generally several Terms ago, it was now amended according to the warrant.

The

Trinity Term, 12. Will. 3. In B. R.

The King *against* The Inhabitants of Marlborough. Case 675.

CERTIORARI was to the justices at sessions to send up what orders they had before them; and hereupon an order of two justices for the removal of a servant-maid, who was got with child within the year in her service, was certified, without shewing how it came there. Two justices, when they make an order, ought to certify it to the sessions. S. P. ante, 376.

And *PER CURIAM*, FIRST, The order is well removed; for when two justices make an order, it is very proper for them to certify it to the sessions, and when they do so the sessions are legally possessed *of it, and it may be well removed from thence hither (a). * [403]

SECONDLY, If one hire a maid for a year, and before the year's end she is got with child, she shall not for that be removed, but shall serve out her time (b); there shall be a year's continual service to make a legal settlement for the charging of a parish; but till the year be out none shall disturb the party from serving. And since she is not removable within the year, if she leave her master without his consent, she may be sent back to her service; but then it is to serve her time, but not a charge to the parish (c). A servant-maid may be removed from her service on account of being with child. S. C. Comb. 354. S. C. 1. Sess. Cases, 2, 8. S. C. Const. P. L.

(a) See same point *Ovencot v. Grindow*, ante, 376.

(b) But it is now determined, that a master may discharge a servant for this cause. See *Shaw's Parish Laws*, 3d edit. ch. 58. f. 22. 2. vol. *Const's Bott*, p. 49. *notis*; and *Rex v. The Inhabitants of Brampton*, Cald. 11.

(c) See *Rex v. Ilip*, 1. *Str.* 423. *P. L.* *Rex v. Eastland*, 1. *Str.* 526. *Rex v. Seaford*, 2. *Str.* 1022. *Rex v. Hampton*, Cald. 11. *Rex v. Watford*, Cald. 57. *Rex v. Westmeon*, Cald. 120. and 2. *Const P. L.* 525. 527. *Rex v. Gretham*, 1. *Term Rep.* 101. *Rex v. Kenilworth*, 2. *Term Rep.* 598.

Anonymous.

Case 676.

HOLT, *Chief Justice*. Upon complaint made to one justice of one being likely to become chargeable to a parish, they both may examine and order jointly; but they both must join in the examination and order, and one must not pin his faith upon the other's sleeve (a). Both justices must examine.

(a) See *Rex v. Sommerton*, ante, 393. and the cases there cited.

The King *against* The Inhabitants of Glamorganshire. Case 677.

AN ORDER OF SESSIONS was made for assessing the inhabitants of *Glamorganshire* for the repair of a bridge in that county, pursuant to the statute of 23. *Eliz.* c. . which was said to be a private law; and therefore the order being removed up by *certiorari*, Order of sessions for assessing to repair a bridge pursuant to a private act of parliament, removed by certiorari. S. C. 500.

It was moved they should not be filed, for that, as it was said, a *certiorari* did not lie, being a private law; and for this was quoted 1. *Sid.* 296. 1. *Keb.* 818. 2. *Keb.* 43. 88. 90.

But

Trinity Term, 12. Will. 3. In B. R.

THE KING
against
THE
INHABITANTS
OF GLAMOR-
GANSHIRE.

BUT PER CURIAM, Wherever there is a particular jurisdiction set up by act of parliament, this Court may command the execution thereof by *mandamus*, and remove their proceedings hither by *certiorari*, to see whether they have observed their authority. Indeed we do not easily grant a *certiorari* in case of commissioners of sewers, for the danger that may befall the country in the interim (a), yet if good reason appear we will grant it; and the reason of 1. Sid. 296. is not because it was a private act of parliament.

GOULD, *Justice*, remembered a case where a *certiorari* was denied to remove orders of commissioners of sewers upon this reason, that if the order was wrong the party grieved had his action, and if it was right it ought not to be stopped or delayed; and that was the reason that it has been sometimes denied in case of order of justices upon an authority by a private act of parliament.

Vide Hard. 480.
Ante, 392.

* [404]

Ante, 216.

To which HOLT, *Chief Justice*, answered, If they meddle with a thing out of their jurisdiction, you say well; otherwise it is when they have conformance of the subject-matter, but * do not pursue their authority. And we often stay the filing of such order, to the intent that if it be not well removed, to grant a *procedendo*; but if it appear well removed and faulty, we file and quash it. And PER IPSUM, There may be a diversity between a private act concerning one single person, and an act concerning the inhabitants of a whole county (b).

And it was ruled that they should make a return, and recite the statute in it (c).

(a) Vide ante, 390.

(b) See Rex v. Hamworth, 2. Stra. 900.

(c) This case was determined before

the judgment was given in the case of Dr. Grenville v. The College of Physicians, ante, 386.—NOTE to the former edition.

Case 678.

Anonymous.

Heir by bond is only chargeable as terre tenant.

HOLT, *Chief Justice*. If one bind himself and his heirs, the heir's lands are chargeable as he is terre-tenant, and not as heir.

Case 679.

Anonymous.

A writ must issue to warrant a voluntary appearance.

HOLT, *Chief Justice*. By the antient rule of the court, there could not be a voluntary appearance without a writ were taken out; but even now there must be a writ taken out before or after; for without a writ the parties have no day in court, without which they cannot appear.

Voluntary appearance and on *cepi corpus* the same.
Ante, 372.

And he saw no difference between a voluntary appearance and one upon a *cepi corpus*; for surely the plaintiff ought not to be put in a worse condition for his kindness in not arresting the defendant. If a writ be returnable *craft. Animar.* and a voluntary appearance to it, it will be the same as if it were upon a *cepi corpus*.

Stone

Trinity Term, 12. Will. 3. In B. R.

Stone *against* Jones.

Case 680.

LIBEL was in the spiritual court, setting forth a prescription for the vicar of the parish of *Marcham* to find a person to officiate in the chapel of *Garworth*, an antient chapel within the said parish, for the ease of the parishioners; in consideration whereof the parishioners, time, &c. paid him and his predecessors two quarters of wheat, and two of malt, yearly.

Upon suggestion of no such prescription, prohibition was moved for.

And IT WAS AGREED BY ALL, that the thing's being by prescription, which properly is triable at common law, did not always suffice to oust the spiritual court of jurisdiction; as if a pension be by prescription, though one may bring annuity for it at common law, yet they may libel for it in the spiritual court upon the prescription; as *F. N. B.* 51. (a).

The spiritual court may try a prescription for the vicar to find a curate for a chapel of ease, in consideration whereof the parishioners are to pay him so much yearly. *Quere.*

S. C. Holt, 595. Ante, 397. 1. *Stra.* 879. 1. *Bar. K. B.* 391.

But IT WAS URGED for the prohibition, FIRST, That of common right the vicar is not bound to officiate out of the parish-church, and therefore * not to be without prescription. SECONDLY, It does not require the vicar to officiate there himself, but to find one to do it, which he cannot be obliged to of common right; and the being of a prescription is traversed, and ought to be tried at common law.

[405]

HOLT, Chief Justice. It is the very point adjudged in *Williams's Case* (b), for it is an ecclesiastical duty to be performed for the advantage of the parishioners; and though it commence by prescription, yet it concerns ecclesiastical persons, and is a mere spiritual thing, and is not at all the same as if it were against a layman, who is not so easily bound by canon law as ecclesiastical persons are; for their proceedings there by prescription shall not charge a layman, or any temporal right. In Vacation, the patron and ordinary may grant a pension, and the parson shall be sued there for it; and upon the statute of *Circumspetiti Agatis* a prohibition was never granted in that case; though *Coke*, in his Comment upon that statute, is of a contrary opinion.

Et adjourn.

(a) See ante, 260. 397. *Johnston v.* (b) 5. Co. 72. *Ryson*, post. 416.

Barton *against* Bartlet.

Case 681.

FOUR PERSONS were arrested upon one writ, and put in bail severally; one of them non-prossed the plaintiff for want of a declaration.

Non prof. *S. C. Holt*, 367.

HOLT, Chief Justice. Till they are severed by declaration, the writ shall be intended joint; and the *non prof.* before declaration must be upon the writ, which is joint; and therefore one *non prof.* will do for all, notwithstanding the several bail.

Clay

Trinity Term, 12. Will. 3. In B. R.

Case 682.

Clay *against* Snelgrave.

The master of a ship cannot sue in the admiralty for his wages.

S. C. Balk. 33.

S. C. Carth. 518.

S. C. Holt, 595.

S. C. 1. Ld. Ray.

576.

1. Vent. 146.

343.

Ray. 3.

2. Stra. 858.

937. 968.

2. Will. 264.

4. Burr. 1950.

Dougl. 101.

3. Term Rep.

267.

* [406]

A LIBEL was brought by the administrator of the master against a ship for his own and seamen's wages.

And a prohibition was moved for, upon a suggestion that the contract was on land.

IT WAS AGREED by all, that the suggestion was naught, in case of suit for seamen's wages only; but the doubt was as to the master.

NORTHEY affirmed, that POWELL, one of the Justices of the Common Pleas, informed him they made no difference in the common pleas, and quoted a case in *Hilary Term*, in the twenty-seventh year of *Charles the Second*, where the Court were divided in the point; and he would make a difference between a contract by land with the master by charter-party and by parol; for in the first he owned * a prohibition should go, but not in the second case; and one of the reasons why prohibitions should not go in case of suit for seamen's wages is, because by the civil law they may sue the ship; and that reason holds with us; for the ship is as much liable for the master's as for the men's wages.

Contra were cited 12. Co. 78. 80. *Hob.* 212. that if the contract be by land, and duty accrue at sea, *vice versa*, a prohibition shall go.

HOLT, *Chief Justice*. It is by indulgence that seamen may sue for their wages in THE ADMIRALTY; but that was never extended to masters, but once in my LORD HERBERT's time; for the master's case differs with that of mariners; for he is a principal servant, and he contracts with the part-owners, and the mariners with him; and a prohibition is a matter of right, with some restrictions; and that which is the ground of prohibition in these cases is the contract being on land; but that does not hold in all cases; for in the case of *Crosby v. Lofmell*, money was taken up at land for the use of a ship distressed in her voyage; and a consultation was granted; otherwise if it were taken up before voyage begun. And in case of local jurisdiction, as that of the admiralty is, there is no difference between the contract's being by deed and by parol; and it is hard to grant a consultation upon prohibition granted on demurmer.

Postea, Mich.
12 Will 3 R.
Sore v. Sawkins.
Hill. 12. & 13.
Will. 3. Grant
v. Bailey.

Ante, 38. cont.
Vide 3. Lev.
60. acc.

GOULD, *Justice*, acc. in omnibus (a).

(a) A prohibition was granted, S. C. Ld. Ray. 578. A prohibition was also granted to a suit for wages by the master in the admiralty, in the case of *Ragg v.*

King, 2. Stra. 858.; and the same point was also adjudged in *Read v. Chapman*, 2. Stra. 936. *Wilkins v. Carmichael*, Dougl. 101.

King

Trinity Term, 12. Will. 3. In B. R.

King *against* Woolaston.

Cafe 683.

DEBT UPON SEVERAL ASSUMPSITS. The defendant pleads, that he had given a bond for the same ; and on demurrer judgment for the defendant (a). Bond a discharge of *assumpsit*. Ante, 86.

Postea, Trin. 12. Will. 3. May v. King.

(a) Adjudged accordingly *Roades v. lor v. Baker*, 5. Mod. 136. *Kearlake Barnes*, 1. Burr. Rep. 9.—See also *Tay- v. Morgan*, 5. Term Rep. 513.

The King *against* Harris.

Cafe 684.

AN ORDER OF SESSIONS for suppressing a cottage upon 31. *Eliz.* c. 7. (a) was quashed, for that cottages are not to be suppressed by indictment. Cottages not to be suppressed by indictment.

(a) Repealed by 15. *Geo.* 3. c. 32.

Anonymous.

Cafe 685.

HOLT, *Chief Justice*. If one be bound to save harmless against a particular thing, the defendant ought to shew *coment* he has done it ; but if it be to save harmless generally, a *non damnificatus* generally will do ; and if it be to save harmless in several particulars, against all persons, it is general. How a defendant may plead to a bond of indemnity.

* [407]

* Anonymous.

Cafe 686.

HOLT, *Chief Justice*. We cannot take notice of a judgment upon the custom of foreign attachment in *London*, without the custom be specially shewn. In foreign attachment custom must be set forth.

Stra. 641.

Anonymous.

Cafe 687.

HOLT, *Chief Justice*. If there be an ill plea, and the replication assign an ill breach, the plaintiff shall have no judgment. Breach ill assigned.
Vide 8. *Co.* *Dr. Bonham's Case*.

The Parish of Erith *against* The Parish of Orford. Cafe 688.

ORDER OF SESSIONS was, "WHEREAS we are informed by the churchwardens, &c." quashed. Order of removal.

Trinity Term, 12. Will. 3. In B. R.

Cafe 689.

Dillon *against* Walcot.

On reversal of judgment and award of restitution, *scire facias* should go to the terretenants. S. C. ante, 312.

WRIT OF ERROR of a judgment given in the court of king's bench in Ireland. Walcot's ancestor having been attainted of high treason in Ireland, and his estate granted by letters patent by King Charles the Second to the Earl of Roscommon, the judgment was reversed by writ of error in the court of king's bench in England, and that reversal affirmed before the Lords; and thereupon a mandate to the court of king's bench in Ireland to award restitution; which they did, without any *scire facias* against the terre-tenant; whereupon Dillon brought this writ of error, setting forth the attainder, and a grant to the Earl of Roscommon, and that the plaintiff was assignee of the said Earl of Roscommon, and that the award of restitution *ad damnum*, &c.

Dyer, 34.
1. Keb. 141.
3. Keb. 29.
2. Salk. 495.
4. Hawk. P. C. ch. 50. s. 13.

The want of *scire facias* against the terretenants was assigned for error, and in *nullo est erratum* pleaded.

PER CURIAM. Here is an extravagant error; for, upon the reversal, the judgment is, "that the party be restored to whatever he has lost, &c.;" but that must be known; and the way is, to come and suggest that he was seised of such and such land, &c. and to take a *scire facias* against the terre-tenants, and they thereupon ought to be summoned, and may come and shew cause against restitution, as perhaps a fine levied by the heir, &c. or by the party himself; and it would be prudent in a purchaser of an attainted person's estate to procure such a fine; and this has been done by the purchasers of H. Martin's estate, while he lay condemned in THE TOWER.

* [408]

Cafe 690.

* Anonymous.

Sessions.

INDICTMENT was taken at sessions held such a day by adjournment, without shewing from what time they had adjourned; and that exception taken, but over-ruled (a).

(a) But see St. Michael's v. St. Cafes, 17. pl. 21. Rex v. Harrowby, Matthew's, 2. Stra. 832. Rex v. Fisher, Burr. S. C. 102. Rex v. Heptinstall, 2. Stra. 865. Rex v. Walker, 2. Scff. Burr. S. C. 88. *contra*.

Cafe 691.

Anonymous.

IF ATTORNEY except against bail, he must give notice of it.

Cafe 692.

Davila *against* Dalmanfer.

Mutual debts may be set one against the other. 2. Burr. 820.

PER CURIAM. If there be two dealers, and they reciprocally pay money for one another, they shall have their reciprocal action for it, in which either of them shall give special bail; and neither

Trinity Term, 12. Will. 3. In B. R.

neither of them shall give the money paid by him in mitigation of damages, unless there be an *account stated*; and they never can have an account against one another (a).

DAVIDA
against
DALMANISS.

(a) But now by 2. Geo. 2. c. 22. f. 13. made perpetual by 8. Geo. 2. c. 24. "where there are *mutual debts* between a plaintiff and defendant, or if either party sue or be sued as executor or administrator, where there are mutual debts between the testator or intestate, and either party, one debt may be set against the other, and either pleaded in bar or given in evidence upon the "general issue at the trial, &c." And

by 5. Geo. 3. c. 30. f. 28. commissioners of bankrupts are authorized to take notice of mutual debts between the bankrupt and any other person, and to admit what shall be due on either side on the balance of such account. But by 8. Geo. 2. c. 24. f. 4. if either of the debts accrue by reason of a penalty, it must be pleaded in bar. In what actions a set-off is allowed under these statutes, see Tidd's Practice, 404. to 408.

Lord *against* Francis.

Cafe 693.

PER CURIAM. An action for a false return is local, but may be laid in the county where it was made, or in that in which it appears on record.

Action for a
false return is
local.
S. C. Holt, 170.

And by HOLT, *Chief Justice*, If one be irregularly chose at a first, and afterwards he is owned by the town, and entered in the town book, or regularly chose into a superior dignity, I should take what followed to be such evidence of a good election (a) as ought not to be controverted.

(a) See Piper v. Dennis, ante, 253.

Anonymous.

Cafe 694.

HOLT, *Chief Justice*. If a man contract for goods, and after carrying them away give the seller a *goldsmith's note* for the money, it does not amount to a payment; but if it were given at the very time of the contract, it would be *prima facie* evidence that it was taken in payment (a).

Banker's check,
when payment.
7. Mod. 139.
2. Salk. 442.
1. Salk. 124.
2. Will. 353.
Banker's draft
must be de-
manded in time.
Stra. 415. 508.
550. 707. 920.
1175. 1248.

And if a man, upon a contract made before, take such a bill, and keep it till the party on whom it is drawn becomes insolvent, in an action brought by him against the buyer upon that bill, he shall be barred (b); but he shall recover the debt upon the original contract (c).

(a) But see now 4. & 5. Ann, c. 9. f. 7.

(b) See Clerk v. Mundall, ante, 203. Bank of England v. Newman, ante, 241. Lambard v. Oakes, ante, 244. Pell v. Garlick, post. 506. East India Company v. Chitty, 1. Stra. 1175. Moor v. Warren, 1. Stra. 415. Manwaring

v. Harrison, 1. Stra. 508. Hayyard v. Bank of England, 1. Stra. 550. Pepys v. Lambert, 2. Stra. 707. Hoare v. Dacosta, 2. Stra. 910. Fletcher v. Sandys, 2. Stra. 1248. Metcalfe v. Hall, Bull. N. P. 275. Tindal v. Brown, 1. Term Rep. 167.

(c) Clark v. Adair, Espin. Dig. 26.

Case 695.

Anonymous.

If ship be lost in her return, seamen shall have all outward wages, and but half while in harbour abroad.

HOLT, Chief Justice. If a ship go freight of an outward voyage, the seamen shall have their whole wages out ; but if at * their return the ship be taken; or other mischief happen, whereby the voyage homeward is lost, they shall have but half-wages for the time they were in harbour abroad (a).

1. Vent. 146. Postea, Hill. 12. & 13. Will. 3. West v. West,

(a) See *Campion v. Nicholas*, 1. Stra. 1844. *Abernethy v. Langdale*, Dougl. 405. *Hernaman v. Bawden*, 3. Burr. 520.

Case 696.

Anonymous.

Action brought by principal is a revocation of letter of attorney.

HOLT, Chief Justice. A. gives a letter of attorney to B. to receive money for him from C. and afterwards brings an action for the money against C. who afterwards pays the money to B. the attorney, it shall not abate the action, because the commencing the action was a revocation of the letter of attorney.

Case 697.

The King against The Parish of Ragley.

Highway.

S. C. Fort. 250.

ERROR of a judgment upon an indictment at the quarter-sessions for non-repairing "a highway between A. and B. in the parish of R." The judgment was, that such a sum *extrabatur et levatur* to repair the said way, *nisi* it were repaired by such a time.

HOLT, Chief Justice. There are statutes that direct the certainty of proceedings in these cases ; as that of 2. & 3. *Phil. & Mary*, c. 8. and 13. *Eliz. &c.*; and they are impowered by law to charge or fine, and that alone to be controlled by traverse. By the statute of *Philip and Mary*, a justice of peace may present at the quarter-sessions upon his own knowledge ; and the justices there are to give as much credit to it as if it were by jury ; and that is a public law (a).

Parish to repair highway of common right.

The parish of common right ought to repair their highway ; but by prescription one parish may be bound to repair the way in another parish.

How an indictment for non-repair must state the locus in quo. Stra. 181.

AND HERE IT WAS EXCEPTED, that it did not appear in what parish the way was ; for it was laid to be "between A. and B. in the parish of R.;" to that B. only may be in R.

Judgment for not repairing highway erroneous.

ANOTHER EXCEPTION was, that the judgment was preposterous, *extrabatur et levatur*, instead of the natural way of *levatur et extrabatur*.

(a) See 13 *Geo. 3. c. 78. f. 19.* 2. *Hawk. P. C. ch. 76. f. 67.* and *Rex v. Justices of Wilts*, 1. Black. 467.

And

Trinity Term, 12. Will. 3. In B. R.

And for this exception the judgment was reversed; and compared to debt upon bond for ten pounds, if judgment were "*ideo consideratum est, quod habeat executionem de præd. 10. et recum peret.*" THE KING :
against
THE PARISH
OF RAGLEY.

PER CURIAM. It would be error.

* [410]

Pet against Pet.

Case 698.

PER CURIAM. The words "brother and sister," and "col-
"lateral," in the statute of Distribution (a) ought in all rea-
son to refer to the intestate, for intestates are the * subject matter ;
and in this court they would never hear argument for distribution
before the statute, but once, in consideration of SIR FRANCIS
WALCOT, who, finding it would not do, procured this statute to
be made ; and the proviso is, that there shall be no distribution in
collaterals beyond brothers and sisters children ; and that must be
brothers and sisters of the intestate. It was upon debate upon a
motion for a *mandamus*.

(a) The words of the act 22. & 23.
Car. 2. c. 10. are, " provided no repre-
"sentation be admitted amongst collate-

"rals after brothers and sisters chil-
"dren."

Brothers grand-
children cannot
share with bro-
ther's children.
S. C. Salk. 250.
S. C. 3. Salk. 138.
S. C. 1. Ld.
Ray. 571.
S. C. Comy. Rep.
87.
S. C. 2. Eq. Abr.
435.
S. C. Holt, 259.
S. C. 1. Peer.
Wms. 25.

Anonymous.

Case 699.

HOLT, Chief Justice. If an officer make an ill return, he shall
be amerced, and we will not allow him to quash the ill return
and make another ; and if, upon disallowance of one return, he
makes a second bad, an attachment shall go.

Mitford against Walcot.

Case 700.

A. Draws a bill of exchange at Madrid, in Spain, on B. at
Amsterdam, payable at two usances. B. after the two usances,
viz. the fourth day, which was the last day of grace, accepts the
bill at London ; and for non-payment the action is brought against
him ; and the declaration shewed the days of drawing and accept-
ance, by which this fact appears.

PER CURIAM, FIRST, An acceptance is an actual promise to
pay (a).

The doubt then was upon the variance of days of grace at
Amsterdam and in England ; for there they have eight, and but four
here ; and that, as it was urged by the custom of merchants, an
acceptance at Amsterdam after time of payment was void, and the

(a) See Wilkinson v. Lutwiche, Stra.
648. Symonds v. Parminster, 2 Will.
185. Pillans and Rose v. Vanmierop

and Hopkins, 3. Burr. 1663. Maber v.
Mathias, 2. Black. Rep. 1072.

Acceptance of a
bill of exchange
is an actual pro-
mise to pay.
S. C. Salk. 129.
S. C. Comy. 75.
S. C. 1. Ld.
Ray. 574.
How far the ac-
ceptance of a bill
of exchange af-
ter it becomes
payable binds
the acceptor.

Trinity Term, 12. Will. 3. In B. R.

MITCHELL
against
WALCOT.

days of grace are no part of the usance; and the acceptance here being to pay *juxta tenorem bill. præd.* it must be understood the same as if it were at *Amsterdam*, for there it was directed and payable.

But it was agreed here,

FIRST, That an acceptance or negociation in *England*, after a bill becomes payable, shall bind the acceptor or indorser, though not perhaps the original drawer. And for this was quoted the case of *Pigot v. Jackson (a)*, in this court, in *Hilary Term*, in the ninth year of *William the Third*, though it were an acceptance to pay *juxta tenorem bill. præd.* as here.

Usance.

SECONDLY, It was resolved, a *usance* is a month at twenty-eight days.

Acceptance.

THIRDLY, If bill be accepted at *Amsterdam*, and no house named where the payment is to be, the party need not acquiesce to it, but may protest the bill; but if he will acquiesce, it is well enough.

Acceptance for
honour of the
drawer.

FOURTHLY, If *A.* draw a bill on *B.* who will not accept it, and *C.* offers to accept it for the honour of the drawer, the drawee need not acquiesce, but may protest; but if he do acquiesce, *C.*

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is bound.

Acquiescence to
acceptance.

FIFTHLY, If bill be drawn on one at *Amsterdam*, and he do not care to accept it, but gets one here to do it, the party need not acquiesce; but if he do, the party here is bound.

And judgment was given for the plaintiff *nisi*.

(a) Ante, 222, 212. 1. *Ld. Ray.* 364. 1. *Salk.* 127.

Case 701.

Rook against The Sheriff of Salisbury.

If an executor has assets to pay a judgment debt, and suffers judgment in an action on a simple contract to go against him by default, and then prays the judgment debt, the sheriff, on a *scire facias* on the second judgment, may return a *devastavit*, and thereby intitle the plaintiff to an execution *de bonis propriis* of the executor.

AN EXECUTOR owed one hundred pounds by judgment, and had assets to pay it, and owed another sum by contract, for which he was sued, and suffered judgment to go against him by default; he paid the former judgment, and a *scire facias* is brought against him upon the second; to which the sheriff at first dath returned a *devastavit*. And this action was brought for a false return.

And IT WAS AGREED, that if a ministerial officer act falsely in his duty, to the prejudice of another, an action will lie for it (a).

And here IT WAS URGED, that the sheriff had no more to do but to levy the money *de bonis testatoris*, if any be found, or else to return *nulla bona*; and then the plaintiff, upon suggestion of a *devastavit*, might have a *scire facias* to enquire of a *devastavit*; and if by inquisition a *devastavit* were found, to warn in the executor to shew cause why judgment should not be *de bonis propriis*.

— S. C. Holt, 644. Ante, 392.

(a) Ante, 393.

And

Trinity Term, 12. Will 3. In B. R.-

And it was further urged, that there was no *devastavit* in the case; for the suffering judgment by default was no confession of assets; but the judgment is conditional, if there be assets in our hands, to be levied of them, and the sheriff has no return to make, but that he levied goods to the value, &c. or that there are no goods; and there is nothing in the writ to warrant such a return as here is: and suppose our suffering judgment by default be a confession of assets, yet it is not a confession of a *devastavit*, which he, without suggestion, as aforesaid, ought not to return.

ROOK
against
THE SHERIFF
OF SALISBURY.

IT WAS URGED *on the other side*, that it was clear the sheriff might well return a *devastavit*, but at his peril, if it were false. And a judgment by default is not an absolute confession of assets, but only a confession of all the assets he ever had; for if the executor had administered them, he ought to shew it in pleading; and if he do not, he is too late after judgment by default. If two actions be against an executor of the same Term, each of one hundred pounds, and he has assets but for one, and pays it, and suffers judgment by default in the other, he shall pay it; and the reason is, because, by not pleading to the second action, * he confesses all the assets he ever had, and cannot avoid it by pleading; and if he had pleaded no assets, and judgment is against him, he shall not avoid it by *audita querela*, because he had not an opportunity of pleading it.

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HOL *, Chief Justice. A *devastavit* is a very proper return for the sheriff to make; and upon such a return execution shall be *de bonis propriis*, and not a conditional one, and is never otherwise; and the reason is, that when a *fieri facias* goes, it is *de bonis testatoris*; and if the sheriff find no goods of the testator, and is satisfied of a *devastavit*, he cannot execute the writ of the goods of the executor, but ought to return the truth, a *devastavit*, and then he shall have power to make execution *de bonis propriis*. And when upon a *plene administravit* assets *ad valentiam* are found, the sheriff shall return a *devastavit*, if he find not assets, and the executor shall never avoid it. Here there were assets, but liable to a former judgment, which he might have pleaded, but omitted; and how can he take advantage of it now. If there be judgment in debt against a tenant in tail, who dies seised, the estate descends to the issue. *Scire facias* is sued against the heir and terre-tenants; issue is returned served; and terre tenant of lands in fee for ancestor had both lands in fee and tail, and judgment by default, and an *elegit* of a moiety of all; and then the issue came to shew the lands were intailed; but rejected, because he omitted to do it in his proper time upon the *scire feci* returned. So it is in case of judgment and release, and *scire feci* returned, if he do not plead the release before judgment upon the *scire facias*, he shall not have *audita querela*. *Vide Hob. Hannor v. Mase*, 283. For when you have a good matter in bar, and an opportunity to plead it, you shall not give it in evidence. And though it be said, that the judgment by default was for want of a demurrer, yet that will not alter the case. *Vide 5. Co.*

When there is matter in bar to be pleaded, and omitted, not to be given in evidence.

Trinity Term, 12. Will. 3. In B. R.

ROOK
against
THE SHERIFF
OF SALISBURY.

• [413]

32. And PER LUY, If two actions are brought against an executor of one hundred pounds each, and he has assets only for one, and he pleads *plene administ.* to both, and then pays off one, and suffers the other to go by default, he shall answer *de bonis propriis* for it; and so if there were ten actions, and he pleads *plene administravit* to all, and afterward pays off one, which is all he has, and then suffers judgment to go by default, he shall be charged with all the rest *de bonis propriis*; so that your concession, that it amounted to a confession of no more than he once had, was too liberal. And in HALE's time, if executor had pleaded several judgments, and any of them were found * against him, he used to direct the jury to find for plaintiff generally; but that was a little hard; and here you are stopped to say sheriff made a false return, to charge him when you might have pleaded it in court.

Judgment was given for the defendant.

Case 702.

Anonymous.

Good behavi-
our.
Post. 566.
Lamb. 115.
Dalt. ch. 75.
Cro. Car. 498.
3. Hawk. P. C.
ch. 1. page 13.
to 16.

HOLT, Chief Justice. By law none can be compelled to find surety for his good behaviour, except it be by ancient custom within a lect, or for vagrancy, or some certain offence; and here one being committed thus, "WHEREAS A. has been convicted of a misdemeanor, and cannot find security for his good behaviour; therefore, &c." And here could be no *certiorari*, there being no record of the conviction; the party being brought up upon *habeas corpus* was discharged on motion. PER CURIAM.

Case 703.

Hill against Wilks.

Outlawry re-
versed.

IT appearing to the Court plainly, that Wilks had got Hill outlawed when he was visible, and to his knowledge easily might be served with process, he was ordered to reverse it at his own charges. Vide Sir Thomas Jones, 211.

Case 704.

The King against Sellinger.

The Court will
not quash an
indictment for
error on mo-
tion.

SELLINGER was indicted for lying with another man's wife, and moved to quash it as a matter not indictable. But PER CURIAM, We will not quash an indictment for matter of this nature on motion; but demur if you will.

Case 705.

Levins against Randall.

In an action by
the treasurer of
an Inn of Court
against a mem-
ber for dues, it is
Ray. Ent. 475.

LEVINS, treasurer of Gray's Inn, brought debt against Randall a member of that society, upon a bond for forty pounds, conditioned for payment of commons and other duties of the house.

sufficient to aver they were not paid to the treasurer.—S. C. 1. Ld. Ray. 594. S. C. Upon

Trinity Term, 12. Will. 3. In B. R.

Upon "conditions performed" pleaded, it was replied, that *Gray's Inn* is an ancient society, &c. and that time, &c. every member thereof, at his being called to THE BAR should pay so much to the use of the house; and the necessary averments made.

LEVING
against
RANDALL.

THE FIRST EXCEPTION to the replication was, that it was averred that it was not paid to the house, and it might be paid to the treasurer.

Sed non allocatur; for payment to the treasurer is payment to the house, as payment to the chamberlain of *London* is payment to the city.

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SECOND EXCEPTION, That this was in the nature of a *nomine pænæ*, and therefore not due till an actual demand; which was not alledged.

An action by the treasurer of an Inn of Court on a bond for dues, need not state that they were demanded.

But HOLT, *Chief Justice*, Surely there is a difference between a bond and a *nomine pænæ*.

GOULD, *Justice*, Where the thing in its nature requires a demand, a bond for doing thereof is not forfeited till demand: and in that case the defendant must take advantage of the want of demand, by pleading that he was always, and still is, ready to pay it; for if he plead performance generally, and the plaintiff assigns a breach in his replication, the defendant shall not rejoin and alledge want of demand, for that would be a departure.

3. Cro. 828.
Noy. 16.
1. Saund. 117.
1. Vent. 36.
2. Saund. 85.
1. Lev. 47, 48.
Hutt. 90.

Quod HOLT, *Chief Justice*, concessit. Vide 1. Cro. 76, 77.

THIRDLY, It was objected, there could not be a prescription for payment of shillings, which was a new coin, for the old coin were marks; but no heed was taken of it.

Prescription to receive shillings.

And judgment was given for the plaintiff, *nisi*.

Ashfield against Neal.

Case 706.

ACTION AGAINST TWO; and before plea one of them dies.

The death of a defendant before plea may be suggested, and the suit continued.

NOTE, By the late act of *William the Third*, the plaintiff may come and suggest this matter on record, and pray leave to go on against the other; but if the action were brought against one of them, the defendant might plead in abatement that the other is living; but in this case the survivor pleaded in bar, and judgment was against him.

And in entering up the judgment it was moved, that the attorney should enter a *non dedicit*, because he confessed the party dead by his plea.

HOLT, *Chief Justice*. Let it be entered so, and the other confess or deny it; and let him look how he puts his costs upon it.

The

Trinity Term, 12. Will. 3. In B. R.

Case 707.

The King *against* Walden.

Indictment for words spoke to justice of peace.

1. Vent. 50.

1. Lev. 52.

1. Stra. 421. 617.

1168.

INDICTMENT, for that the defendant being before a justice of peace, for a matter, as it did appear, conusable by him, he contemptuously, &c. spoke these words: "Your worship speaks to me here, but you dare not do so in another place." And it was quashed on motion (a).

(a) See 1. Roll. Abr. 57. Cro. Car. 14. 1. Com. Dig. "Action for Defamation" (D. 15.).

Case 708.

Anonymous.

Inspection of charters.

HOLT, Chief Justice. We never order charters to be brought into court on trials, when copies of them may be had at the Rolls (a); but we will compel them to give you sight of them (a).

(a) See Cutts' Case, ante, 394.

castle, 2. Stra. 1222. and the cases there cited.

* [415]

(b) See Rex v. Hofman of New-

Case 709.

* Lacy *against* Kynaston.

If covenantee agree to save covenantor harmless, it is a defeasance.

S. C. ante, 221.

S. C. post, 548.

S. C. 1. Ld.

Ray. 419. 688.

S. C. Salk. 573. 575.

HOLT, Chief Justice. If A. covenant to do such a thing, and covenantee agree to save him harmless, that is a defeasance of the covenant. If two be bound jointly and severally in a bond, and release is to one of them, it releases the several as well as the joint lien. A. is bound by bond to B. and B. covenants not to put it in suit till such a time, it is a defeasance; but if he grants not to sue upon it at all, it is a release.

S. C. 3. Salk. 298. S. C. Holk, 178. 218.

Case 710.

Anonymous.

Apprentice's master entitled to what apprentice earns.

Trover will not lie against executor of an apprentice for a ticket issued after his death.

HOLT, Chief Justice. Trover lies for the master for a ticket or other writing entitling his apprentice to money earned by him during the apprenticeship (a).

But here the trover was against the executor of the apprentice for a ticket given out after the death of the apprentice, for money earned by him during the apprenticeship; and because it never was in the apprentice's possession, the action was not maintainable; but after the executor receives the money, the master may have *assumpsit* for so much money received to his use.

(a) See Barber v. Dennis, Salk. 68. Hill v. Allen, Vezey, 83. 1. Burn's Justice, 17th edit. 90.

MICHAELMAS

MICHAELMAS TERM,

The Twelfth of William the Third,

IN

The King's Bench.

Sir John Holt, Knt. Chief Justice.

Sir John Turton, Knt.

Sir Lyttleton Powys, Knt.

Sir Henry Gould, Knt.

} *Justices.*

Edward Northey, Esq. Attorney General.

Sir John Hawles, Knt. Solicitor General.

* Anonymous.

* [416]

Case 711.

SIR B SHOWER, *Knt.* moved for a prohibition for libelling in the spiritual court for a parish rate, for mending and cleaning the parish organs ; and it was granted (a).

1. Roll. Rep. 126. 2. Roll. Abr. 311. 3. Mod. 8. 228. 6. Com. Dig. "Prohibition" (G. 2.). 3. Com. Dig. "Eglise" (G. 3.).

(a) See Jeffery's Case, 5. Co. 67. 1. Burr. 240. Palmer v. Bishop of Rogers v. Davenant, 7. Mod. 194. 236. Exeter, Stra. 570. Cart v. Marsh, Andr. Anonymous, Poph. 197. Campbell v. 69. Forty v. Dwbear, Fort. 346. But- Aldrich, 2. Will. 79. Wilson v. Greaves, terworth v. Barker, 3. Burr. 1689.

Johnson against Ryson.

Case 712.

LIBEL was in the spiritual court for a mortuary alledged due by custom. The suggestion set forth the statute of 21. Hen. 8. c. 6. and that there was no custom in that parish for the payment of mortuaries. No prohibition for suit for a mortuary, not having pleaded there was no custom.

PER CURIAM. There is no colour for a prohibition, since you have not pleaded ; for a mortuary is a thing within their jurisdiction ; and if there were any room for a prohibition, it would be for want of a custom ; and then that ought to have been pleaded : and he compared it with a *modus decimandi*, for which there is no remedy but in the spiritual court ; and the case of *Hind v. Bishop*

S. C. 1. 1. Ld. Ray. 609. Ante, 326. 1. Vent. 5.

of

Michaelmas Term, 12. Will. 3. In B. R.

JOHNSON
against
RYSON.
Ante, 397. 404.
405.
Vide 1. Vent. 3.
220. 335.
2. Vent. 239.
2. Cro. 483.
N. B. 50.
3. Cro. 675.

of *Chester* (a) is not like this ; for the statute excepts a *mortuary*, and a *mortuary* is a mere ecclesiastical right, for which there is no remedy but in the spiritual court ; and though a writ of annuity may lie for a pension by prescription, and so recoverable at common law, yet it may be sued for in the spiritual court, against the opinion of *Coke* (b) ; which opinion has been frequently exploded since.

And the rule for a prohibition was discharged (c).

(a) Cro. Car. 237.

1. Ld. Ray. 609. *acc.* and *Jones v. Stone*,

(b) 2 Inst. 497.

1. Ld. Ray. 578.

(c) See the case of *Johnson v. Oldham*,

* [417]

Case 713.

Wilmout against Tyler.

An appellant cannot have a *habeas corpus* until the sheriff has returned *cepi corpus et parat. habeo*.

S. C. post. 448.

S. C. 1. Ld.

Ray. 671.

S. C. 1. Salk. 63.

Postea, Pasch.

13. Will. 3.

Wilmot v. Tyler.

HE was found guilty of manslaughter upon an indictment for murder ; and the Court at THE OLD BAILEY being dissatisfied with the verdict inflicted eleven months * imprisonment upon him, according to the statute of 18. Eliz. c. 7. And being thus in the sheriff's custody, AN APPEAL was brought ; to which the sheriff returned *cepi corpus*, but that he could not bring him without a *habeas corpus*.

PER CURIAM. The return is not good, for it should have been *cepi corpus et parat. habeo*, and then the appellant may have a *habeas corpus* returnable *immediate* ; and you must be well advised how you file this return.

An appellee who has received clergy on a conviction of manslaughter, shall have time to plead such special matter to the appeal.
Post. 426.

And the return being amended, a *habeas corpus* taken, and the appellee brought to the bar, and the appellant called, who appeared ; after the appellee's arraignment, which was in *French*, the Counsel for him demanded *oyer* of the writ, and time to plead.

PER CURIAM. Of right you ought to plead *instante* ; but since he has had his clergy before upon the indictment, and so has a special matter to plead, you ought to have convenient time to plead ; but it must be *quasi instante*, and as of this day, and no imparlance entered.

And he was committed to the Marshal.

Case 714.

Musgrave against Escourt.

No. suit.

HOLT, Chief Justice. A man may be nonsuited in Term-time, and the record made up in the Vacation ; but it must be on THE ROLL of the preceding Term.

Anonymous

Michaelmas Term, 12. Will. 3. In B. R.

Anonymous.

Case 715.

AN ORDER OF JUSTICES OF PEACE willing churchwardens to pay a scrivener five pounds due to him for drawing of indentures for setting out poor children to trades, was quashed, as being a thing out of their power (a); but the way had been, to order a parish rate for levying so much a week till a convenient sum were raised; and in that case, as soon as money was raised, an action would lie for the scrivener against the churchwardens.

(a) See Reg. v. Belzun, 11. Mod. Chichester, Foley, 33. Rex v. Welch, 178. Reg. v. Ware, 1. Conft, 272. 1. Conil, 277. Rex v. Goodcheap, Rex v. Limshouse, Foley, 22. Rex v. 6. Term Rep. 159.

The King against Dorney.

Case 716.

AN INQUISITION OF FORCIBLE ENTRY was quashed, for that it did not appear what estate the party on whom the entry was made had; for if he were tenant at sufferance, it would not lie.

Forcible entry, what estate the party had must appear. S. C. 1. 1. Id. Ray. 610. S. C. Salk. 260. S. C. Holt, 267. Poph. 205. 7. Mod. 115. 123. 3. Salk. 169. 2. Hawk. P. C. c. 64. f. 36.

* Wall against Grovet.

* [418]

Case 717.

PER CURIAM. If one bind himself in a bond to go to a place not in being, or do other impossible thing, the obligation is single.

THE CASE was, One laid a wager that he would walk in such a time to "High-Park Corner;" and the place being "Hyde-Park Corner," and no such place as "High-Park Corner," he lost his wager.

1. Inf. 206. a. et lib. ibi cit. 1. Roll. Abr. 479.

The King against Fowler.

Case 718.

FOWLER was brought up by *habeas corpus*, being taken up upon an *excommunicato capiendo* returned in this court; by which it appeared, that the *significavit* was "*pro subtractione decimarum five aliorum jurium ecclesiasticorum.*"

NORTHEY moved to have him discharged, for that the cause, which ought to appear certainly in the *significavit*, was altogether uncertain by the "*five aliorum, &c. (a).*"

HOLT, Chief Justice. The writ of excommunication need not specify the cause, but is well generally "*pro contumaciâ (b);*" but the *significavit* ought to express the cause. But since the statute of 5. Eliz. c. 23. by which the writ is first to be brought into this court, and to be delivered of record to the sheriff, who is to return it hither, the cause ought to appear specially in the writ, because otherwise the Court cannot know how to follow the directions of the statute.

The cause of excommunication must be particularly specified, not only in the *significavit*, but in the writ of *excommunicato capiendo.*

S. C. Salk. 293. 350. S. C. Holt, 334. S. C. Fort. 243. S. C. 1. Id. Ray. 586. 618. Stra. 950.

(a) But see Annally, 314. and Rex v. Keat, 2. Stra. 950. Rex v. Smith, 2, Stra. 946. (b) Fitz. Nat. Brev. 63. Reg. Orig. 65.

But

Michaelmas Term, 12. Will. 3. In B. R.

A writ of excommunicato capi-
endo, which does
not specify the
particular cause
for which the
party was ex-
communicated,
but only "for
" subtraction of
" tithes and o-
" ther ecclesia-
" stical dues,"
may be quashed
on a *habeas cor-
pus*.

But the doubt was, Whether the Court could quash the writ here for this uncertainty; or, Whether the party should not go into chancery, where the *significavit*, which was only recited in the writ, was, and move there to have the writ superseded *quia erroneè emanavit*.

And as to that NORTHEY argued, that the statute, by directing the *capias* to be delivered to the officer of record here, and returned here, did impliedly give the Court power over it. *Vide 2. Cro. 566, 567. Cro. Car. 196. Just. Jo. 226. Mo. 667.*

* [419]

HOLT, *Chief Justice*. I would see precedents since the statute whether the form of the writ be changed since, as it were reasonable it should, that the Court might proceed or not, according as it seems to them proper, on the face of the writ; and if the writ be bad, and by the statute made returnable here, it is fit we should have power over it; for when a writ is gone out of chancery, returnable in another court, that court wherein it is returnable are the judges of the validity of it; and therefore * we ought to have the writ itself here; and if it prove not good, to quash it *quia minus sufficiens in lege*, and then send a *superseatas* to the sheriff; but this ought not to be upon a *habeas corpus*, but upon the return of the writ by the sheriff. Indeed there have been several discharged upon a *habeas corpus* for one of the nine cases within the statute; but whether that should be upon plea pleaded, or on motion, was a *vexata quæstio*.

And at another day precedents were produced *pro* and *con*. 8. *El. Rot.* 20. general, same year. *Rot.* 44. special cause mentioned. 15. *El. Rot.* 54. 17. *Jac. Rot.* 111. *Hilary Term*, 17. & 18. *Car. 2. Rot.* 2.; some as here, others with an *alio- rumque jurium eccl.*

And at last he said, he thought they were wrong upon the *habeas corpus*, because it was a good return to a *habeas corpus*, that he was committed upon an *excommunicato capiendo*, without any more.

And let the writ be quashed *nisi* in a week; and *superseateat nisi*; and that was the rule.

NOTE, While this matter was under debate, the party was bailed.

Case 719.

Anonymous.

Suit may be in
the spiritual
court after death
of one of the
parties, for in-
contingency.

A WOMAN was libelled against in the spiritual court for *incontinen- cy* with a man since dead.

It was suggested for a prohibition, that the man was her husband: and now the spiritual court could not examine whether he had been her husband or not, because that would tend to bastardize the children, and dissolve the marriage after the death of the party.

HOLT,

Michaelmas Term, 12. Wih. 3. In B. R.

HOLT, *Chief Justice*. If there were a marriage *de facto*, ANONYMOUS. though illegal, yet they shall not libel to avoid it after the husband's death; but if there was none, the death of the man ought not to protect her from a prosecution for her whoredom (a).

(a) See the case of Hemming v. Price, post. 434.

The King against The Inhabitants of Longcrichill. Case 720.

PER CURIAM. If on appeal a parish be adjudged the last legal settlement of a poor person, that parish is concluded thereby, not only as to the parish from which the first order of removal was, but also as to all other parishes (a).

If an order is confirmed on appeal it is conclusive.

S. C. 2. Salk 489.

S. C. Holt, 510.

SECONDLY, It is a fatal exception to an order of two justices, that it does not say that one of them was of the *quorum*. *Vide statute 13. & 14. Car. 2. (b)*.

One justice to be of the *quorum*.

* [420]

THIRDLY, If an order be made to remove a poor person from A. to B. and then he comes to C. the justices cannot graft * an order for sending him to B. upon the first order, because they are not parties to it; but such order may be given in evidence of a settlement in B.

A pauper cannot be removed from C. to B. under an order to remove him from A. to B.

(a) 3. Burr. 551. 2. Term Rep. 598. order shall be quashed for this exception.
2. Bott, 860. —See S. P. ante, 393.

(b) But now by 26. Geo. 2. c. 27. no

Anonymous.

Case 721.

HOLT, *Chief Justice*. If a person preach in a parish-church without leave of the parson, he is a trespasser (a). Preaching.

(a) See the case of Turton v. Reynolds, post. 433.

* The Duke of Schomberg against Murrey.

Case 722.

IT WAS MOVED to have leave to charge Murrey, being a prisoner in Newgate, with a *scandalum magnatum* and *ac etiam billæ* of one hundred pounds, in order to hold him to special bail, for saying the Duke of Schomberg was a cheat, and had cheated the king and the army. Scandalum magnatum.

S. C. Holt, 640.

HOLT, *Chief Justice*. This being a poor man, to charge him thus will be a perpetual imprisonment to him; and special bail has been often demanded in these actions, yet it has been frequently denied.—But he was ordered to find two that would swear themselves worth twenty-five pounds each, and himself be bound in one hundred pounds.

Burnet

Michaelmas Term, 12. Will. 3. In B. R.

Cafe 723.

Burnet *against* Wells.

"He is a cheat" not actionable, without a colloquium. **C**ASE. These words spoke of a tradesman, "He is a cheat;" and further at another time, with a *colloquium* of him and his trade, "He has nothing but rotten goods in his shop." Judgment by default, and several writs of enquiry.

1. Roll. Abr. 53.
Cro. Car. 515.
Raym. 62.
1. Sid. 35. 48.
Show. 181.
Cro. Jac. 204.
Salk. 694.
Stra. 797. 1169.

And *PER CURIAM*, This was prudently done, the first words being not actionable without a *colloquium*, and therefore entire damages would spoil all. Thus the plaintiff having released the damages upon the first words took judgment upon the second, which were held clearly actionable. But it was agreed, if the words were only that "he had rotten goods," the action would not lie; for the slander is, to have nothing but rotten goods.

Judgment was given for the plaintiff (a).

(a) See *Davis v. Miller*, Stra. 1169. and *Saville v. Jardine*, 1. H. Bl. Rep. 531. and the cases there cited.

Cafe 724.

Heliard *against* —.

Person found bailiff generally must account for all in declaration.

S. C. Holt, 713.

* [421]

Cafe 725.

* Morley *against* —.

Discontinuance.

3. Bl. Com. 458.

1. Tidd's Pract.

419.

2. Seillon's Prac.

459.

PER CURIAM. If the defendant plead as to part, and say nothing as to the rest, it is a *discontinuance*, unless the plaintiff will take judgment by *nil dicit*.

Cafe 726.

Hammond *against* Ouden.

A declaration for non-delivery of six hair and splitted sieves shall be intended to mean six of each kind.

ACTION ON THE CASE. The plaintiff declared, that in consideration of seventy pounds paid by him to the defendant, the defendant *super de assumpsit* to deliver to the plaintiff, on or before the eighteenth day of *January* following, on board the plaintiff's ship in such a place, twenty-five quarters of oatmeal, and six hair and splitted sieves. The plaintiff alledged, that he did bring his ship, on the said eighteenth of *January*, to the said place, and that the defendant did not deliver to him, &c. Verdict, and damages for the plaintiff.

COWPER took exceptions to the declaration.

FIRST, That it was altogether uncertain, so that a jury could not assess damages upon it; for it did not appear how many of the sieves were to be hair, and how many splitted.

SECONDLY,

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SECONDLY, That the things were to be delivered on or before the eighteenth of *January*; and the breach is laid in not delivering on the eighteenth, when the promise might be well performed in delivering at any time before.

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BUT PER CURIAM, As to the first, if a man bind himself to give another six cows and horses, it must be six of each, and it shall be taken severally as strongest against the grantor. Besides, here it is laid "*sex cribras*," ANGLICE hair and splitted sieves; and we cannot take notice but a hair sieve and a splitted one are the same.

As to the second THEY HELD (but professed there was no occasion to be positive as to that), that the declaration was good enough, without saying that there was no delivery before the eighteenth; for though the defendant had election to deliver them before the eighteenth, yet for that there must have been a concurrence of the plaintiff, for he must be there and accept; for the defendant cannot make a tender before the eighteenth sufficient to excuse him from making a delivery on the eighteenth; for the eighteenth being the ultimate time the law appoints for the doing it, the one party ought to be there to tender, and the other to accept. And if the defendant * had come before the eighteenth to the place, and tendered it, it would not excuse him from tendering at the day. 3. Cro. 18. Condition for payment of money at or before such a day; upon which debt was brought; and the defendant pleaded, that he was at the place at a day before, and tendered the money, and that the plaintiff was not there to receive it; and held no good plea; for though he had election to pay before or at the day, yet he cannot make tender before the day, if the plaintiff be not there willing to receive it; and you cannot compel him to receive sooner; therefore the last day, which is the day appointed by both parties, they ought to meet, the one to tender, the other to receive. 3. Cro. 73. *Sed quære*, If he had given the plaintiff notice that he would deliver at such a day before, whether the plaintiff ought not to be there then to receive. 2. Cro. 9, 10. 14.

If a thing is to be done on or before a certain day, must be there ready to tender it at the last convenient time. Tender before will not excuse.

Ante, 399.
Postea, Trin.
13. Will. 3.
Lancashire v.
Hillingworth.

* [422]
1. Vent. 147.
Vide 2. Cro. 9.
10.
Yel. 36.
2. Cro. 14.
3. Lev. 104.

Ante, 399.

But if the declaration were faulty in that point, yet it is helped by verdict; for if there had been a delivery before the eighteenth of *January*, that would have made issue for the defendant, and the jury could not find for the plaintiff. *Peeters v. Opie* (a), Action upon a promise, that in consideration the plaintiff should build a house for the defendant, the defendant should pay the plaintiff one hundred pounds. The plaintiff avers, that *parat. fuit et obtulit se*, and that the defendant did not pay him; and it was adjudged, that this was no good breach; for if the defendant was to pay the money upon building of the house, he should say that he brought his materials, and that the defendant hindered him, for he ought to shew that he has done all that was in his power; but upon *non assumpsit*, and verdict, the plaintiff had judgment: and this is a stronger case than ours. 1. Sid. 13. 1. Saund. 228. An action for falsely and

3. Lev. 104.

(a) 2. Saund. 350. S. C. 2. Lev. 23. S. C. 1. Vent. 177. 214. S. C. 2. Keb. 811. 837. S. C. 3. Keb. 45.

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maliciously indicting is no good declaration, without saying that it was *without probable cause*, and that the plaintiff was acquitted (a), or an *ignoramus* returned (b); and yet this fault was helped by verdict. 1. *Vent.* 219. A. promises to pay B. money, and if B. died within age of eighteen to pay to his executor; the executor brings the action, and avers, that there was no payment to him, without saying anything of his testator; and yet cured by verdict.

Judgment for the plaintiff.

(a) See *Lewis v. Farrel*, 1. *Str.* 114. *Mod.* 148. 214. *Gilb.* 185. *Chambers v. Parker v. Langley*, 10. *Mod.* 145 209. *Robinson*, 2. *Str.* 693. *Wicks v. Fen-tum*, 4. *Term Rep.* 247.
(b) *Jones v. Gwyne*, *Salk.* 15. 10.

* [423]

Cafe 727.

* Clapham *against* Wray.

Entry signed by a judge, of a person surrendering himself in discharge of bail, is the record of it. *S. C. Holt*, 614. **HOLT, Chief Justice.** When a prisoner renders himself in discharge of bail in a Judge's chamber, the course is to have an entry of it in a piece of parchment, signed by the Judge, which is sent over with the prisoner to THE MARSHAL, and ought to be brought back and filed in the office, and is in truth the record; and the entry in the Judge's book is not very material.

Cafe 728.

Anonymous.

Seal must be put by the mayor. **HOLT, Chief Justice.** If a person, pretending to be mayor of a corporation, put the corporation seal to a deed, yet it is not, by that, the deed of the corporation. 4. *Term Rep.* 699. *Danv.* 44. 10. *Co.* 30. 1. *Vent.* 257. 1. *Lev.* 46. 1. *Sid.* 8. 1. *Salk.* 255. 1. *Kyd on Corp.* 268. 301. 450.

Cafe 729.

Anonymous.

Prohibition. **HOLT, Chief Justice.** In a prohibition, either of the parties contending below may be plaintiff.

Cafe 730.

Anonymous.

Award of mutual releases not good. *Ante*, p. 130. *acc.* **CASE** upon three several promises, and an award ordering mutual releases pleaded in bar.

PER CURIAM. No good plea, because nothing is awarded that bears an action; but if there were any thing awarded, for the which an action would lie, it would be a good plea, though it were not performed.

And judgment was given for the plaintiff.

Anonymous.

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Anonymous.

Cafe 731.

HOLT, *Chief Justice*. We never make a rule upon a sheriff's return to make a particular return.

Anonymous.

Cafe 732.

HOLT, *Chief Justice*. Though inquisition of forcible entry be quashed, yet restitution is not of course, contrary to *Raym.* 85.

Forcible entry.

* [424]

More against Watts.

Cafe 733.

WATTS was brought in upon *habeas corpus*, before the return of a *capias* in *withernam*, upon an *elongatur*. returned upon a *homine replegiando*; and offered to plead *non cepi*, and give bail.

If to a *homine replegiando* the sheriff return *elongatur*, and a *capias* in *withernam* issues, but before its return the party is brought in upon a *habeas corpus*, he may plead *non cepi*, and give bail for his appearance on the return of the writ.

SHOWER urged that he ought to be received to do it; for that it is a civil action only for recovering of damages for the taking and detainer, and likewise to procure the party his liberty; and that the *capias* in *withernam* was like process of outlawry upon mean process, the end whereof is to put in bail to the original action; and if it were not so, this process might be made a snare for people's liberties. This writ of *capias* in *withernam* is no writ of execution; and we can have no action of false return against the sheriff: *First*, Because the *elongat* is grounded upon an inquisition. *Secondly*, If he cannot replevy the party, he can make no other return; for he is not to take upon himself to falsify the suggestion of the writ. After a presentment of a GRAND JURY, the party still stands *retus in curia*, and may traverse i.; *a fortiori* the sheriff's return of an *elongatur* ought not to be conclusive; and he quoted the case in 2. *Rob. Ab.* 462. that though sheriff returns outlawry of felony, yet the party may aver, that he appeared at the fifth county.

S. C. 2. Salk. 581.
S. C. Holt, 626.
S. C. Lilly, Ent. 293.
S. C. 1. Ld. Ray. 613.
2. Show. 218.
221.
6. Mod. 84.
7. Mod. 9.

But that case was denied to be law by THE COURT.

MOUNTAGUE contra. This is not a civil action for damages, and to have the party enlarged, but is such a prosecution in which the defendant, if convicted, shall be fined and pilloried: and the very command of the writ is, that the defendant should lie in gaol till party be suffered to be replevied by him; the words are "*donec præfat' M. secundum legem et consuetud' Angliæ replegiari possit.*" There are no precedents that we can find of bailing in this case; there are many in a *homine replegiando* for a villein, where the villein was bailed, and the lord ordered to make a return. And he quoted the *Lord Gray's Case* in king *Charles* the Second's time (a), where the defendant, upon *elongat* returned and award of *withernam*, came in, and was fined; and having obtained his pardon, moved to be bailed; and upon this the Judges assembled, and held, that the return was conclusive, and that he could not

(a) 6. State Trials, App. 16. Raym. 473. Skin. 61. 76. 81.

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be bailed; but might have a false return against the sheriff, if he had wronged him; and if that remedy failed by death of sheriff, they held, there might a commission issue for the taking an inquisition of the fact, which, if found against him, he might traverse and try by jury, and so he had a means to discharge himself. And he compared a *capias* in *withernam*, in this case, to a *capias ad satisfaciendum*, both being with a *quousque*.

* [425]

HOLT, Chief Justice. The case of the outlawry is much a stronger case, for that is for a default in him in not appearing before; and surely the case you cite is very hard to maintain, and the reason they grounded themselves upon wrong, *viz.* that the party was concluded by the sheriff's return of an *elongat'*; and * we have two records of a *non cepi* pleaded after an *elongatur*; and so has the law been holden several times since, and issues tried thereupon. And this is no criminal prosecution, for the king cannot have it, and damages are always given in it.

GOULD, Justice, said, *ac etiams* have been added to such writs.

Ante, p. 36.

Suppose he had come before the *elongat'* returned, and entered an appearance, and after *elongat'* had been returned, there ought to be no *withernam*; and if one had gone, it ought to be superseded upon pleading *non cepi*, without any bail. And it is against all reason, that they should be estopped by the return to say that they have not taken him. There is no diversity between a *homine replegiando* and a *common replevin* for cattle. And if upon *elongat'* in replevin for cattle, the defendant come and plead a *non cepi*, it shall supersede a *withernam*; and so is *F. N. B.* And if we consider upon what matter the writ is grounded, it will appear to be a matter within the sheriff's knowledge; for the writ supposes the cattle or party to be taken, and the sheriff does not know whether it be so or not; and if he finds them not, to replevy, he can make no other return but an *elongatur*; and that puts an obligation upon the defendant to come into court and discharge his person or cattle from a *withernam*, by pleading *non cepi*. And it has been resolved since my Lord G.'s time, that one might plead a *non cepi* after *elongat'* returned; and a *withernam* is but a mean process grounded upon the return of *elongat'*, and the issuing of it cannot make the thing worse than the return had made it; and there never was any law against bailing one on mean process. But here you come in too soon; for you cannot plead till the writ be returned, nor bailed till after plea pleaded; when you appear on the return, you ought to move for them to declare, for they are demandable at the return, as upon an appeal; and if they do not appear, they shall be nonsuited, and the defendant discharged, and the plaintiff put to a new writ. If defendant in replevin come in on the replevin, he need not *gage deliverance*; but if he come not in upon the replevin, but upon a further process, he must *gage deliverance* in some cases; and he utterly condemned the case in *Raymond*, before cited. Here is a charge and a denial, so the matter is indifferent; and

Ante, p. 396.

Vide ante, 36.
Raym. 474.

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and if the defendant appear on the *pluries homine replegiando*, and plead *non cepi*, he shall not need to give bail; but if he come upon the *withernam*, he may plead *non cepi*, but must give bail, which is in the * nature of gaging deliverance; vide 12. Ed. 4. 4. Upon a *non cepi* on return of the replevin, the defendant is in court without bail; but if he comes in custody, there must be bail; the words of the book are, "he must continue in custody," and that is in bail. And here, because he could not be bailed before plea, and that he could not plead before a declaration, which could not be till the writ was returned; it was offered for the defendant to accept a declaration as of the return of the writ, but denied.

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* [426]

And here THEY HELD CLEARLY, that no action of false return would lie against the sheriff for returning an *elongat*, in any case, where he cannot have sight of the thing to be replevied, because he can make no other return; but if such an action could have lain, the taking an inquisition would not have prevented it; for it is not a sheriff's taking an inquisition where it does not lie, will protect him from an action. And in an appeal for murder, after return of the writ, we bail, nay and give time to plead, sometimes.

No action of false return will lie against the sheriff on return of *elongat* where he could not see the things to be replevied.
Ante, 417.

At the day of the return of the writ the defendant was brought in again;

And HOLT, Chief Justice, said, he must plead a *non cepi* in person in court, and the bail must be in a sum certain, and in the nature of gaging deliverance, viz. that the defendant shall appear *de die in diem* till judgment; and in case return be awarded, that he shall restore the party to his liberty, and pay all costs and damages, or surrender his body to prison. And he quoted the case of *Dela Bastille* (a), who came in on the return of *elongatur*, whereby the *withernam* was adjudged superseded; and that of *Sturville*, who came in on the very day on which the *homine replegiando* was returnable. And I never doubted, but a defendant might plead a *non cepi* on the return of a *withernam*; for otherwise he would be in perpetual imprisonment, and that would be hard.

Bail must be in nature of gage deliverance.

Non cepi may be pleaded on return of *withernam*.

IT IS OBJECTED, that the plaintiff ought to declare in person; and that he cannot now do, because we say the defendant keeps him his prisoner.

I ANSWER, In this case, they that sued the writ for him may for necessity declare for him, and the declaration is always *ad hoc detinet*; and if in any case the plaintiff declared in person, it must be where he was replevied, or where the defendant brings him with him into court as his villein.

IT IS OBJECTED, that he ought to be in custody till the issue is tried; as where cattle are replevied, the plaintiff has them in his possession till the cause be determined. 11. H. 4. 10.

(a) Ante, 36. Carth. 286. Comb. 200.

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If defendant ap-
pears on the
pluries, no
withernam to go.

* I ANSWER, 7. Ed. 4. 15 Upon the *pluries*, *elongat.* was re-
turned, the defendant appeared; a *withernam* is awarded, and that
should not have been; and therefore a *superfedeas* was sent to the
sheriff, because the *withernam* issued erroneously; upon the *super-
fedeas* the sheriff returned, that before the coming thereof he had
delivered the defendant's cattle to the plaintiff in *withernam*; and
that as soon as he received the *superfedeas* he came to the plaintiff,
to make restitution, but that he had eloined the cattle; and there-
upon the defendant prayed a *withernam* against the plaintiff, and
had it. And where the defendant appears, and pleads *non cepi*, or
claims property, there never ought to go a *withernam*; but that
writ only goes where the thing cannot be replevied, and defendant
will not come and plead.

IT IS OBJECTED, that the writ in the *Register Orig.* 79. com-
manding the sheriff to enlarge the lord taken in *withernam*, upon
his producing the villein to be replevied, would be useless, if that
be so.

I ANSWER, That writ is to enlarge the lord, upon his suffering
the villein to be replevied; before the day of return he is to be en-
larged by that writ, which otherwise the sheriff could not do, as
he thought, or at least would not. Ind. ed, if the defendant come
in upon the day of *pluries* returnable, or return of *elongat.* and
avow, or plead other plea, which puts not an end of the matter,
there may be room for a *withernam*; but if he plead *non cepi*, or
claim property, which puts an end to the matter, such plea is a
superfedeas of the *withernam*. And where he denies the taking,
there is no reason why he should be imprisoned till that be tried;
for there is only a bare affirmation to charge, and there is his ne-
gation against it; so the matter stands indifferent, and the sheriff's
return does not strengthen the matter a whit; for he cannot help
making such a return, where he finds not the thing to replevy.

IT IS OBJECTED, The command of the writ is to detain
quousque he suffers plaintiff to be replevied.

The *alias* in re-
plevin in nature
of a *justicies*.

I ANSWER, True, the sheriff cannot discharge him *quousque*
that be done; the first and *alias* in replevin are only in nature of a
justicies empowering the sheriff to hold plea of the matter by re-
plevin in the county, and the *pluries* is the original on which plea
is holden in the courts above; and the first and second are not re-
turnable, but the third is returnable upon the sheriff's default of
holding plea upon the *justicies*; and that after *elongat.* returned,
the defendant * may plead a *non cepi*; vide *Kel.* 71. *N. B.* 74.
And if cattle be taken in *withernam*, by way of execution in re-
plevin, the plaintiff thereby gains an absolute property in them in
lieu of his own; but not so where the *withernam* is a process. If
one declares in replevin for cattle with an *adhuc detinet*, and de-
fendant has judgment against him for damages, by payment there-
of the property of the distress shall be vested in him; but in a
homing

If cattle be ta-
ken in *wither-
nam* by way of
execution, in
replevin, plain-
tiff has proper-
ty; but not
where it is but
a process.

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homine replegiando, though he plead a *non cepi*, and upon that found against him, judgment be for damages against him; yet the liberty of man is such, that thereby he can gain no property therein, but a *capias* will go against him, and he thereupon shall be kept in *withernam*; and the precedents in *Rastall* upon this head, are not to be depended on. If a *homine replegiando* be brought, and the defendant claim the party as his villein, that will be a good return for the sheriff to make; and there shall be no replevin till plaintiff give security, and that in court; and then there shall go a writ, reciting the security entered into in court, to the sheriff to deliver the plaintiff; and when the plaintiff comes in upon that security so entered into in court, he is not at large, but to find new security, that he shall appear from day to day, pending the cause; and that if judgment go against him, he shall render himself to the defendant, and he takes him out of court. *Vide* 8. *Hen.* 4. 2. F. "Mainpernor," 21. 32. *Hen.* 3.

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When a defendant comes in upon a *capias* in *withernam*, and is bailed, that is but an easing of the custody he was in upon the *capias* till the matter be tried; and then if the issue be against him, he is, I think, to render himself into custody again, and then he is in by virtue of the *capias* in *withernam*: Like the case of *audita querela* by one in execution; if it be upon a deed, nonage, or the like, the Court does bail the plaintiff, upon condition of a recognizance to pay damage, or render his body to prison; and if the matter be against him, and he render himself to prison, he shall be in upon the first execution; and so he will here, by virtue of the *capias* in *withernam*. But suppose he does not render his body in execution, can the Court award another *withernam*? And I think it can; and it is like, where a man is bailed upon an appeal of murder to appear from day to day, if he make default, it shall be recorded, and process shall go against his bail, and a *capias* against himself; and if he do not make default, but come in discharge of his bail, he shall be committed as at first. But suppose in replevin defendant appear at the *elongat.* returned, * and plead *non cepi*, * which is found against him, what shall be done then? There shall be judgment, and a *withernam* thereupon; and the reason is, because a pleading a *non cepi* upon the *elongat.* is a *superfedeas* of the *withernam* at first, and that is after falsified by the verdict, which thereby takes off the *superfedeas*, and then the matter is open for a *withernam*. And it is like the case of *W. 2. c. 46.* whereby a writ of inquisition issues out of chancery, returnable here, to inquire of malefactors throwing down inclosures *noctanter*, &c. and upon return thereof a *distringas* shall go to summon the adjacent vills to repair, and to inquire of the mischief, and to command the said vills to make restitution; and the writ in that case has words of execution in it to levy the damages found, and to bring them into court; yet because it gives a day to the adjacent vills to come in and plead, they may come, and either traverse the inquisition, or demur to it, and till that be tried proceedings shall

If one is bailed in *withernam*, and the issue be against him, he is to be rendered to custody,

2. Cr. 67.
Yelv. 59.

* [429]

If *non cepi* be pleaded, and found against him, judgment shall be, and *withernam*.

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1. Jo. 306.

By appearing
and pleading on
the *withernam*,
all proceedings
to stay till issue
determined.

stop; but after judgment they are let loose again, and a *distringas in infinitum* shall go. 1. Cr. 280. This was devised by NOY, then Attorney General, upon the reason of the law, though there were no proceedings upon that statute since the 13. Ed. 1. till that time. In like manner in our case, by appearing and pleading upon the *withernam* a *non cepi*, proceedings are stopped till that issue be determined; and when that is done, they shall be opened again; but there are no precedents for this, but the reason of the common law. And if he do not appear, he forfeits his recognizance; and besides a new *withernam* shall go against him; and if he do not make default, you have him in execution upon the old process revived; indeed we are in an untrodden path, but go upon the reason of the law in like cases. And here he shall not *gage deliverance*, because he pleads he has him not; if he had confessed the taking, he must have done it; or if he had pleaded in abatement, he must have *gaged deliverance* conditionally, that is, if he had taken him; and thereupon a writ should go to the sheriff, to which he might return that he has him not; and upon *non cepi* there shall be no gager of deliverance in replevin for cattle. N. B.

Ante, p. 396.
425.
Are demand-
able on the re-
turn-day.

And he said, they should have the writ in court, and be ready to declare, for they were demandable at the return-day in this case, and in replevin for cattle, as well as upon an appeal.

* [430]

* And though here we take bail, yet some entries are, *et statim committitur custod. mariscb. ibi remansur. quousque* he suffered the plaintiff to be replevied. Vide 5. H. 4. Rot. 25. Hom. repl. to the sheriff of Devon; and on *elongat.* returned, a suggestion of a *latitat* to Somersetshire, and a *capias* in *withernam*: and after party came *coram domino rege apud W.* and several *manuceperunt* him, to keep him *quousque replegiari voluerit*, &c. Hil. 16. R. 2. Rot. 16.

In *pluries* reple-
vin there is a
day in court.

WE ARE ALSO OF OPINION, that the *pluries repleg.* gives a day in court; for there is no day in common replevin but as here; to deliver cattle, or shew cause to us such a day why he did not, or could not; and there is no express summons of the party, but only an implied one; and if he appear not then a *pone* shall go, and, if he makes default to that, a *capias*. Indeed in *Rastall* the entry in a *homine repleg.* is *attachiat. fuit*; and the reason is because the party himself ought to appear: and if a writ be returned unexecuted, as *nil habet per quod summoneri possit*, he may notwithstanding appear to prevent a *capias*; and what day have the neighbouring vills upon the *distringas*, according to the statute, but the return of the writ? and yet there they may come and traverse the fact's being done *noctanter*, or that they were the next vills, or even the damage; and what day has the plaintiff in any case but the return of the writ? and in consequence of law the party may be said *attachiat.* in replevin; and so in this case with a witness, where he is brought in in *withernam*; but you must

Postea, p. 435.

not

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not take notice of his being in custody in any case, but where he is in *custodiâ mareschalli*, though he be actually in gaol. But the clearer and better way of declaring will be to say thus, “DOMINUS REX mandavit vicecomiti breve suum, &c.” and so set forth the whole replevin, return, *withernam*, and the return thereof; of which see a precedent in *Rast.* 560. in replevin for cattle. And this is the better way, because the whole matter will appear on record; in the common pleas they only recite the substance of the writ, but here in this court it is set forth in *hæc verba*.

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WATTS.

IT IS OBJECTED, that here they cannot make an attorney for the plaintiff, and he is not to be found to make one for himself.

I ANSWER, Since the law enables him to sue this writ by friends, it will of consequence enable them to make an attorney for him.

But another doubt was, whether the plaintiff being an infant, he should prosecute by attorney, or *prochein amy*; *ad quod non fuit responsum*. And here the writ being against three, one whereof only was brought in; it was doubted by the plaintiff how they must declare; to which it was answered, they must do as if it were in an appeal, declare against him that appeared, and continue process against the others. * [431]

Where the writ is against several, must declare against those who appear, and have process against the others. If plaintiff is demanded, and will not declare, shall be nonsuited.

And HOLT, *Chief Justice*, said, it would be a question whether the plaintiff should not be put to find pledges; but at last the plaintiff was demanded, and would not declare, and so was nonsuited, and the defendant discharged.

NOTE; While this case was under consideration, HOLT, *Chief Justice*, ordered MR. CLERK the secondary to prepare a draft of the recognizance which the bail were to give; which he did; and after great consideration HOLT, *Chief Justice*, ET CURIA, approved of this that follows:

“Et super hoc vener. hic in cur. dict. domini regis coram ipso rege A. B. et D. et manuceperunt, et quilibet eorum manucepit pro præfat. D. WATTS ad habend. corpus ejus coram domino rege apud præfatum tru. et sic de die in diem quousque judicium inde redditum fuerit. Et si continget quod idem D. W. convincetur, quod tunc ipse præfat. D. WATTS se prisonæ maresch. maresch. dicti domini regis coram ipso rege in withernam reddet ibid. moratur. donec præfatum W. M. e custodiâ suâ deliberabit, et ad largum quo voluerit, ire permittet; vid. quilibet manucaptorum præd. in hac parte sub pœna quingent. librarum, quam quidem summam quingent librarum iidem manucaptores concedunt, et quilibet eorum concedit de terris et catallis suis et eorum cusustibet fieri, et ad opus præd. TH. M. levare, si continget præd. D. WATTS, ad præfatum tru. seu aliquem alium diem per Cur. domini regis hic in præmiss. præfix. aut præfigend. personaliter non comparere, aut si continget judic. versus præf. D. WATTS in hac parte reddi et præf. D. se dict. prisonæ mar. maresch. ea occasione non reddere.”

Anonymous.

Michaelmas Term, 12. Will. 3. In B. R.

Cafe 734.

Anonymous.

Person of ill fame not bailable.

HOLT, Chief Justice. A person of ill fame is not bailable by the statute of *Westminster the Second*.
See Hawk. P. C. 3. vol. ch. 15. l. 49. 44. 3. Bulst. 113.

Cafe 735.

Anonymous.

The Master may examine *ex parte*.

HOLT, Chief Justice. When a matter is referred to THE MASTER of the office to examine, and a summons or a service of the rule to the party, if he will not attend, THE MASTER may examine *ex parte* without motion.

Cafe 736.

Anonymous.

HOLT, Chief Justice. One is not to be heard for one in contempt, or convicted, without his client be in court.

* [432]

Cafe 737.

* Hemming against Price.

Suit may be in the spiritual court against a woman for incontinency after the death of the man, whom she suggested to be her husband.

S. C. ante, 419.

S. C. Holt, 457.

SHE was libelled against in the spiritual court *ex officio*, for adultery with one now dead, by whom she had children living; and having pleaded below, that she was married to him, it was replied, that she had a former husband then living.

A prohibition was moved for, suggesting the matter of the plea.

It was urged, that by sentencing her, they would in effect bastardize the issue, which ought not to be after the death of one of the parties.

HOLT, Chief Justice. Do you think that if a man and a woman cohabit together, and have issue, and one of them die, that that shall protect the other from being proceeded against in the spiritual court for fornication? and this shall not bastardize the issue, for he was a bastard without any proceedings of theirs, if the parents of it were never married. The meaning of the saying, that one shall not be bastardized after the death of either of his parents, is, that the spiritual court shall not proceed to dissolve a marriage *de facto* after the death of either parties, as in case of consanguinity, precontract, &c. but in this case, if the replication below be true, the marriage was *ipso facto* void. *Vide Kenn's Case (a)*, Administration was committed to a woman, as widow of J. S. and a libel was in the spiritual court to repeal the administration, upon suggestion that J. S. had a former wife living at the time of his death; and there indeed a prohibition was granted.

It is only a marriage *de facto*, which shall not be avoided after death in the spiritual court.

(a) 7. Co. 42. 43. b. 44. 2. Same Stallage, Cro. Jac. 186. Jenk. 289. case under the r. See also Styles Rep. 10.

Vide

Michaelmas Term, 12. Will. 3. In B. R.

Vide Wine v. Selleck (a), One having two wives died, and one of them libelled against the other for jactitation of marriage; and she suggested that it was to avoid her marriage, and a prohibition granted. And none of the cases in 1. *Roll. Abr.* 356. are like this. 22. *Edw. 4. Fitz. "Consultation" pl. 5.* A. marries B. and afterwards turns her off, and takes L. to wife, by whom he has issue, and dies; after his death the former sues the second wife to avoid the marriage, and held it could not be, because the husband was dead. But here is no libel to question the marriage, but to punish for fornication; it is true her defence is, that she was married, and the question only is, Whether when they have jurisdiction of the matter, and issue arises upon the defendant's plea, whether they shall not try it; and why not as incident to the original cause? But where their law does not agree with ours, they shall indeed * judge of the incident, but not according to their law, but according to ours, if both laws vary in the point. And the sentence in the spiritual court, in this case, would be no conclusion to the child, as it would be in case of divorce; and it is for fear of a conclusion there cannot be a divorce after the death of one of the parties; and this being a prosecution *ex officio*, ought not to be discouraged.

Hamming
against
Parce.

* [433]

And PER CURIAM, No prohibition.

(a) Trinity Term, 2. Jac. 2.

Turton against Reignolds.

Case 738.

A LEGACY of fifty pounds a-year was left as a maintenance for a parson to preach once a-week in the parish-church of B. He was to be chosen and removed by the majority of the parishioners; who chose one R. whom the churchwardens refused to open the church to; whereupon he libelled against them in the spiritual court.

No one can
preach in a
church without
leave of the par-
son.

S. C. ante, 430.

S. C. Holt, 527.

Postea Hil.

13. Wm. 3.

Finch v. Harris]

And a prohibition was granted, for that he did not shew he had a licence from the parson of the church, in whom the freehold of the church is, and without whose consent none can preach in his church. It is true, it may be an ecclesiastical offence for churchwardens to shut out the parson, or any other appointed by him to preach in the church; yet it cannot be one not to open the church for one appointed by a stranger, without he has the parson's licence; and you should have shewed in your libel that you had such a licence.

And HOLT, *Chief Justice*, was of opinion, that if the ordinary had appointed one to come and preach in such a church, yet he could not justify doing it without consent of the parson. And if a person give a charity to a certain clerk for preaching in such a parish, he must do it by the consent of the parson.

And

Michaelmas Term, 12. Will. 3. In B. R.

No one can preach without licence from the ordinary.
Lind. 288.

And HOLT, *Chief Justice*, further said, that let a parson be ever so orthodox and able, yet he is punishable for his presumption, if he preach without licence of the ordinary; but the ordinary *ex debito justitiæ* ought to give such licence to one that is fit; but if he refuse, no *mandamus* will lie, but his remedy is to appeal.

* [434]

Case 739.

* *Rosiere against Sawkins.*

When a master is appointed to the command of a ship, he, and not the owners, has the right of appointing officers and sailors to the ship, unless it be otherwise specially agreed between them.
S. C. ante, 399.

TRESPASS by the master for a battery on the servant, *per quod, &c.*

The defendant pleads, that the plaintiff and three more were owners of a boat for conveying of passengers between L. and G. and they constituted the defendant master of it; and that finding the said servant on board *damage feasant*, he took him and turned him out.

The plaintiff replied, that being part-owner, he commanded him to go on board and serve there.

To which the defendant demurred.

S. C. Holt, 460.

And adjudged *pro defendente*; for when the part-owners had made the defendant master, they could not put any servants upon him without a special agreement for it, for breach whereof an action would lie; for the very making him master impowers him to choose his servants, for he is answerable for all events, and therefore but reasonable he should have liberty of choosing such men as he can confide in, and for whose honesty and diligence he may take security; and the owners have no means to avoid it but to recall the master's authority; and it is one of the inconveniencies of jointenancy, that one alone cannot do that.

Jud. pro defendente.

Case 740.

Anonymous.

Information.

INFORMATION was filed against a gaoler for suffering one taken up upon an *excommunicato capiende*, to go at large.

Case 741.

Snow against Firebrasse.

A declaration for board and lodging for several months is sufficiently certain after verdict.

QUANTUM MERUIT on a special promise, that whereas the plaintiff, at the request of the defendant, did find the defendant with meat, drink and lodging for several months, he promised to pay him what it was worth.

After verdict

IT WAS MOVED in *arrest of judgment*, that the declaration was too incertain for the time.

But

Michaelmas Term, 12. Will. 3. In B. R.

But being after verdict it was held well, as *indeb. pro diversis mercimoniis*, especially being executed.
Judgment was given for the plaintiff.

SNOW
against
FIREBRASS.

* [435]

* Blaxton against Honore.

Case 742.

DARNELL urged, that if it appear on the face of the libel, that the ecclesiastical court has no jurisdiction, they may be prohibited without suggestion.

Prohibition not
to go to the spi-
ritual court
without sugges-
tion.

But CURIA *contra*; for the suggestion is a fundamental point, and is the declaration on the writ (a).

(a) Vide 2. Inst. . 12. Co. 63. in requiring suggestions before they would grant a prohibition, much admired.—
against common law courts were examined; and the great care of the Judges
NOTE to the former edition.

The King against Purfey.

Case 743.

AN INDICTMENT (a) was, "that A. using the trade of buying and selling cattle, at B. in the county of M. did buy and expose to sale bad cattle, &c."

An indictment
that A. using
the trade of
selling cattle
at B. in the
county of C.
did sell bad
cattle, &c." is
bad for uncer-
tainty.

And it was quashed for uncertainty; for PER CURIAM, If it be understood that the buying and selling was "at B. in the county of M." there is no *venue* where the exposing to sale was; and if "B. in the county of M." be applied to the place of sale, there is no place laid where the using the trade was; so *quâcunque viâ* it will be impossible to make it good.

(a) This indictment was filed in Easter Term, 10. Will. 3. Roll 42.

Anonymous.

Case 744.

PER CURIAM. When exception is taken to bail, there ought to be notice of it to the defendant's attorney.

Notice.

Anonymous.

Case 745.

WHEN one is removed hither by *habeas corpus*, and turned over, there is a *committitur* sent over to THE MARSHAL with him, and that ought to be brought back and filed in the office; and let that be observed.

Committitur on
bab. cor. ought
to be returned
and filed.
Ante, 423. 430.

Anonymous.

Case 746.

HOLT, Chief Justice. One charged with buggery not bailable.

Buggery.

Anonymous.

Michaelmas Term, 12. Will. 3. In B. R.

Cafe 747.

Anonymous.

Costs.

HOLT, *Chief Justice*: When proceedings are set aside for irregularity, there shall never be costs.

Cafe 748.

Adams *against* Arnold.

Breach.

ACTION upon several promises; and in assigning the breach it was, "*et præd.* ADAMS the plaintiff *non, &c.*" Upon demurrer, judgment was given for the defendant.

* [436]

Cafe 749.

* Dubois *against* Trant.

Administration committed to one *durante minoritate* of an executor, whether on his dying under age it may be repealed, and committed to the residuary legatee.

4. Burn's E. L. 236.

1. Com. Dig.

"Administration" (B. 8.).

6. Com. Dig. "Prohibition"

(G. 18.).

2. Enc. Abr.

410.

A. By will devised eight hundred pounds to his wife, and the residue of his personal estate to his son, an infant, when he came to the age of twenty-one years, with provision for his education in the *interim*; and if the son died under age, the residue to his nephew, who was likewise under age, upon the same contingency; and if he died under age, the residue to the plaintiff *Dubois*, who now sued in the spiritual court.

The testator made his said son executor, and died; administration *durante minoritate* was committed to the mother. The son died intestate; the nephew continuing under age. *Dubois*, the contingent residuary legatee, in case the nephew died under age, being also next of kin to the nephew, libelled against the widow to have her administration repealed.

And a *prohibition* was moved for, for these reasons:

FIRST, Executors and administrators are officers in trust for the testator and intestate; and as the ordinary cannot change an executor appointed by the party, so now since the statute of 31. *Edw.* 3. c. . and 21. *Hen.* 8. c. 5. it is directed to whom administration shall be committed; and when once the ordinary has executed his authority (for since the statute he has no more), the administrator has the same absolute property that an executor has; and the ordinary shall not interfere (*a*). It cannot be denied, but the wife here was next of kin to her husband and her son, who was residuary legatee, and who, as such, should have administered if he were of age, if the father had died intestate.

SECONDLY, An administrator is a temporal officer, of which the common law takes notice; and though the custom of the realm allows the ordinary to create him, yet he cannot destroy him after.

(*a*) See *Harrison v. Weldon*, 2. *Stra.* 911. S. C. *Fort.* 303. that the ordinary cannot be said to have executed his authority if he never had an opportunity to

make the election, which the statute 21. *Hen.* 8. c. 5. gives him; and that in such case he may revoke an administration granted.

THIRDLY,

Michaelmas Term, 12. Will. 3. In B. R.

THIRDLY, The inconveniency would be intolerable, if the ordinary had such a power to repeal; for he might do it in the midst of a suit by a creditor against him, and so abate his suit, to the great vexation of creditors; or it might be in the midst of a suit by an administrator, to recover assets to discharge just debts, to the great waste of assets, and likewise to the great prejudice of creditors.

Duroid
against
Trant.

FOURTHLY, It is frequent with them to grant administration *Postea*, 443. with a limitation or condition; which shews, that in their own opinions, they cannot revoke; for otherwise, what need they grant them upon condition?

TO WHICH *it was answered*, that most clearly an administration may be revoked, but in what cases is the question; and this diversity was put, that regularly, when the * statute of 21. Hen. 8. c. 5. is rightly pursued by the ordinary, he cannot afterwards revoke such administration granted according to the statute; and in that case the administrator gains an absolute indefeasible interest therein. But where he does not pursue the directions of that statute in granting administration, he gives indeed an interest to the administrator, but a defeasible one, and such as may be after repealed; as if there be two in equal degree, or wife and next of kin, there he has election to which of them to grant it; and therefore if he grant it to one of them, he shall not avoid it; but if, intending to grant it to the next of kin, he should grant it to one more remote, he may after revoke it at the suit of the next of kin. *Vide* 1. Sid. 293. 409. Then it must be admitted, that the right of administration is now in the infant residuary legatee; and this they admit in their suggestion, that she has administration in trust for the infant residuary legatee, to whom she is not next of kin; so the whole question is, Whether administration, which a residuary legatee ought to have, if he were not under age, can be well and irrevocably committed to one that is not next a kin to him? *Vide* Dy. 372. 1. Vent. 317. 1. Sid. 280. that right of administration belongs to the residuary legatee by the equity of the statute; then the matter is no more than this, that the bishop gives the curatorship of this infant to her, and why may he not take it from her again, if he sees occasion? for it is no disturbance of the right, for that always remains in the infant; and it is like a guardian appointed by the court of chancery. And it would be very inconvenient, if when the right of administration is in one, who, in respect of infancy, is incapable of administering, and the spiritual court grants it to another, if they should not have power to revoke it upon occasion; for otherwise the administrator might waste all the estate of the infant. By the statute of 21. Hen. 8. c. 5. f. 3. and 22. & 23. Car. 2. c. 3. upon granting administration, the ordinary ought to take a bond, &c. which is not done here, therefore he has not pursued his authority; *ideo* administration not absolute. If administration be granted to a person then solvent,

* [437]
Where directions of the statute are pursued, administration cannot be repealed; but where they are not, may revoke.

a. Stra. 1137.

compos

Michaelmas Term, 12. Will. 3. In B. R.

DUBOIS
against
TRANT.

compos mentis, or within communion of the church, who after be-comes insolvent, *non compos*, or excommunicate, shall it not be repealed? *Vide* 3. *Keble*. 124. 131. 282.

Where there is
an executor un-
der age, admi-
nistration shall
be committed to
the residuary le-
gatee.
Ante, 306.

• [438]

3. Jo. 225
1. Cro 201.
2. Lev. 55.
2. Ventr. 217.

1. Jo. 228.

HOLT, *Chief Justice*. Where there is an executor under due age, if there be legacies, the residuary legatee ought to have * ad-ministration *durante minoritate*, and not the next of kin to the intestate; because that by the statute of 3. *Edw. 3.* it is to be committed to the most loyal and next friend of the intestate; and the making a residuary legatee in such a will is a manifest indica-tion that such a testator took that person, whom he has so made, to be his next friend. If a *feme covert* die intestate, leaving divers debts due to her before coverture, and administration is committed to her brother, or other next of kin, it shall be repealed and grant-ed to her husband; and that has been so adjudged in the common pleas, in the case of *Duncomb v. Mason (a)*. But the principal case is very considerable: there was the like point in *Chief Jus-tice PEMBERTON*'s time, and a prohibition granted, but the point not determined: Most certainly, by this grant of administration, an interest is granted and vested in the administratrix. If admin-istration be granted to a creditor, and afterwards a more principal creditor comes, it shall not be revoked for him; and it may be here, *factum valet fieri non debuit*. Before the statute of *Edw. 3.* the administrator was but a mere servant of the ordinary remove-able at pleasure, but since he has the absolute property. Indeed an administrator *durante minoritate* shall do nothing to the prejudice of the executor; and there is a diversity, in point of determina-tion, between an administrator *durante minoritate* of an executor, for that shall only endure till the executor comes to seventeen, at which age he may act as executor; and grant of administration *durante minoritate* of *J. S.* for that shall hold till he comes to twenty-one (*b*).

GOULD, *Justice*, *accord*. and it is hard to maintain, that a grant of administration to one during the minority of one that has right to administer, is a bare authority.

Postea, 443.

And HOLT, *Chief Justice*, AND OTHERS; at another day, It is a point worthy of consideration, and much may be said to prove, that the ordinary has executed his authority; therefore let prohi-bition go, and declare immediately.

(a) 1. *Ld. Ray.* 685. See also *Fawtry v. Fawtry*, 1. *Salk.* 36. *S. C.* 1. *Show.* 351. *S. C.* *Holt*, 42. *Rea v. Bettelworth*, 2. *Stra.* 891. 1111. 1118. and the statute 29. *Car.* 2. c. 10.

(b) See *Freaker v. Thomas*, 1. *Salk.* 39. *S. C.* 1. *Ld. Ray.* 667. *S. C.*

Comy. 110. *S. C.* under the title of *Reek v. Thomas*, post. 500. *Atkinson v. Cornish*, 1. *Ld. Ray.* 338. *S. C.* *Carth.* 446. *S. C.* 5. *Mod.* 395. *S. C.* ante, 194. *S. C.* *Comb.* 475. *S. C.* *Holt*, 43. *Jones v. Lord Strafford*, 2. *Bac. Abr.* 382.

Anonymous.

Michaelmas Term, 12. Will. 3. In B. R.

Anonymous.

Case 750.

H**O****L****T**, *Chief Justice*. By outlawry, a lease for years is forfeited before any seizure; and therefore if it be sold after ^{By outlawry a lease is forfeit} ^{before seizure.} ^{Ante, 176.} ^{Hard. 101.} ^{Raym. 17.} outlawry, and before seizure, the king shall avoid the sale; but if one outlawed sell an estate in fee before seizure, the sale is good, and the king shall not have the pernancy of the profits; but if the sale be after seizure, the sale shall hold, but the king shall have the pernancy of the profits; but even in case of a lease there ought to be an office found for the king. *Vide Cro. Jac. 82.*

HILARY TERM,

The Twelfth of William the Third,

I N

The King's Bench.

Sir John Holt, Knt. Chief Justice.

Sir John Turton, Knt.

Sir Lyttleton Powys, Knt. (a) } *Justices.*

Sir Henry Gould, Knt.

Sir Thomas Trevor, Knt. Attorney General.

John Hawles, Esq. Solicitor General.

(a) *Sir LYTTLETON POWYS, Knt.* Bench, on the twenty-eighth of January was removed from the Court of Exchequer to a seat in the Court of King's

* [439]

Cafe 751.

* Anonymous.

Sale by a bankrupt to a near relation is a badge of fraud.

UPON A QUESTION, Whether a conveyance made by a bankrupt, a short time before act of bankruptcy committed, were fraudulent or not? these points were agreed by the Court :

FIRST, That the sale being to a near relation of the party's, was some mark of fraud, though not a conclusive one; because relations might be real creditors, or give a valuable consideration.

Non payment of money on executing a bill of sale is evidence of fraud.

SECONDLY, The non-payment of money at the time of executing the deed is another (a).

Bill of sale specifying the money paid, evidence of bona fide conveyance.

THIRDLY, It is some evidence of a *bona fide* conveyance, that the deed mentions money paid; but that had need of other corroborating circumstances, as enjoyment.

1. *Stra.* 134. 2. *Stra.* 1229.

(a) See the case of *Martin v. Pewtreff*, 4. *Burr.* 2478. *Worsley v. De Mattos*, 1. *Burr.* 467. *Wilson v. Day*, 2. *Burr.* 827. *Butcher v. Easto*, *Dougl.* 282. and see *Cooke's Bankrupt Laws*, 3d edit. 106. 109.

Anonymous.

Anonymous.

Cafe 752.

PER CURIAM. If there be evidence of both sides, and verdict against the strength of evidence, if such trial be not peremptory, there ought not to be a new trial. Causess for granting new trials.

General causes of new trials are, want of due notice, practice or misdemeanor in jury, in either party or their agents; the absence of some material witness which they could not then have; verdict against evidence, excessive damages, &c. (a).

NOTE. In many cases, upon granting of new trial, the former verdict ought to stand as a security; for otherwise the party, against whom it passed, might spirit away the evidence on whose testimony it was obtained; and so, without any corroboration of his right, deprive him of the benefit of his verdict.

(a) For the several grounds on which the Court will grant new trials, see 1. vol. of Mr. Selton's Practice, 507 to 516.

* [440]

* Grant against Bailly.

Cafe 753.

A MATE of a ship libelled in the admiralty court for his wages; and prohibition moved for by **RAYMOND**. The mate of a ship may sue in the admiralty.

And agreed **PER CURIAM**, It ought to go in case of a master; *secus* in case of mariners; and the mate being a mean between both, it was doubted. But **THE COURT** inclined to consider him as a mariner, because he is hired by the master, as other mariners; but the master is put in by the owners. And afterwards, upon conference with the common pleas, where a like case was under consideration, ruled that no prohibition should go (a). S. C. Salk. 33. S. C. Holt, 48. S. C. 1. Ld. Ray. 632. 1. Vent. 146. 343.

(a) See accordingly *Marth v. Allenfon*, 2. Vent. 181. *Hook v. Moreton*, 1. Ld. Ray. 397. *Clay v. Snelgrave*, ante, 405. *Rofire v. Sawkins*, ante, 434. *Read v. Chapman*, Stra. 937. *Ragg v. King*, Stra. 858. and *Wilkins v. Carmichael*, Dougl. 101.

Anonymous.

Cafe 754.

PER CURIAM. The reason why an executor, defendant or plaintiff, upon a nonsuit, shall pay no costs, is, because the suit being *in auter droit*, he may well be thought misconfutant of the truth of the cause of action (a). Executor.

(a) *Portman v. Carne*, 2. Stra. 681. on this subject see *Hullock on Costs*, *Marth v. Yellowly*, 2. Stra. 1106. But 174, &c.

Anonymous.

Cafe 755.

PER CURIAM. One cannot change his attorney on record, without leave of the Court; and after judgment the attorney on record may receive and acknowledge satisfaction, by virtue of his An attorney on record not to be changed without leave of the Court.

Hilary Term, 12. Will. 3. In B. R.

ANONYMOUS. his former warrant; and when attorney of record is changed, the record ought specially to mention that it was by consent of the Court.

Cafe 756.

The King *against* Sir Hugh Everard.

Parish may tax themselves to carry on a suit for the public good of the parish.

A RULE was obtained by surprize, for leave to file an information against him, and several other parishioners of the parish of — in *Essex*, for laying a tax upon themselves for carrying on a suit against their vicar in the spiritual court for incontinency.

And THE COURT held, they might lawfully tax themselves, by consent, to carry on a suit for the public good of the parish; but in that case the majority could not bind the rest, without their consent, as in case of other rates.

Vide ante, 154, 155.

But the information being filed, it was referred to the Master of the office.

Cafe 757.

Anonymous.

Statute rolls.

HOLT, *Chief Justice*. Acts of parliament on the rolls are not distinguished into paragraphs, but that is done by the printer.

* [441]

Cafe 758.

* Anonymous.

Payment of debts by executor *de son tort*, is only in mitigation of damages. Post. 441.

HOLT, *Chief Justice*. Though an executor *de son tort* pay debts duly, with all the assets that come into his hands, yet the rightful executor shall maintain trespass against him; but he may give such payment in mitigation of damages; yet the right of the action and verdict shall go against him.

2. Bl. Com. 507, 508. 2. Term Rep. 100. 3. Term Rep. 590.

Cafe 759.

Anonymous.

Matter in discharge must be specially pleaded.

PER CURIAM. If a *scire facias* be returned "served," and the defendant has an act of parliament for his discharge, and omits to come and plead it, he has for ever lost the advantage of it.

Cafe 760.

The King *against* Margason.

On *habeas corpus* rule may be to bring him up any day the same Term, without filing it; *aliter* if to be in a subsequent Term.

MARGASON was committed to *Newgate* upon the statute of 8. & 9. Will. 3. upon refusal of paying such money as was in his hands as collector of the taxes; and removed up by *habeas corpus* the last day of last Term.

And

Hilary Term, 12. Will. 3. In B. R.

And then, *absente* HOLT, *Chief Justice*, a rule was made to bring him up the first day of this Term, without filing the return. THE KING
against
MARGASON.

HOLT, *Chief Justice*. Though such a rule might well be for the bringing one up, in a day in the same Term, without filing the writ, yet it ought not to have been to bring him up at a day in another Term, without filing the return; for he cannot now be brought up upon a writ returnable in a precedent Term, by such a rule, without the return thereof be filed; therefore you must take out a new writ.

And this being a cause concerning the king's revenues, you had best give notice to THE ATTORNEY GENERAL; for we ought not to file a return of any such matter removed hither, without notice to him. In matter concerning the revenue notice to be given to the Attorney General.

Anonymous.

Case 761.

HOLT, *Chief Justice*. If covenant be to pay a sum to a stranger, at such a day and place, tender and refusal is no excuse of non-performance (a). Tender and refusal.

(a) See *Merritt v. Rane*, 1. Stra. 458. *Clarke v. Tyson*, 1. Stra. 504. *Bullock v. Noke*, 2. Stra. 579.

Anonymous.

Case 762.

HOLT, *Chief Justice*. A master cannot assign over his apprentice, as he may another chattel, but it must be with his own consent (a). Apprentice assigned. Dalt. 58.

(a) *Rex v. Eastbridgeford*, 2. Stra. 1115. *Rex v. Chaplin*, Comb. 224. *Burr. S. C.* 133. *Rex v. Barnes*, 1. Stra. 48. *Caistor v. Eccles*, *Ld. Ray.* 683. *Salk.* 68. *Wadsworth v. Executors of Guy*, Holy Trinity v. Shreditch, 1. Stra. 10. 1. Sid. 216. *Rex v. Channel*, 3. Keb. *Baxter v. Benfield*, 1. Const's P. L. 523.

Anonymous.

Case 763.

HOLT, *Chief Justice*. There needs no notice to the churchwardens, &c. of a servant's coming into a parish to gain a settlement; because the justices of peace, though there had been notice, cannot disturb him (a). A servant need not give notice to gain a settlement.

(a) See the statutes 1. Jac. 1. c. 17.; 1. Stra. 470. S. C. Fort. 326.; *Rex v. Portsmouth*, 2. Stra. 746.; and the statute 35. Geo. 3. c. 101.

* [442]

* Anonymous.

Case 764.

HOLT, *Chief Justice*. There is a diversity between *pleas in bar* and *pleas in abatement*, as to time; for if one be to plead *abatement* before the *essoin-day*, suppose of *Michaelmas Term*, if he plead in bar any time before *craft. Animarum*, it is well; *secus* in *abatement*. Pleas in bar and abatement.

Cafe 765.

West against West.

PER CURIAM. Upon amending a declaration, the plaintiff has his election to pay costs, or grant an imparlance. If he grant an imparlance, the defendant may plead *de novo*, for the imparlance sets aside his former plea. If he pay costs, he is let in to plead again, so it be some new matter; for this reason, because that it might be, the fault which the plaintiff amends was the occasion of his pleading that plea; but there he shall not have liberty to plead the same plea over again; and if he plead *de novo*, it must be a plea to stand by; and if he will not plead a new plea, the old one must stand. After plea in bar, one cannot plead in abatement; and the amendment and imparlance will not let one in to do it.

In amendment of declaration, the plaintiff may pay costs, or grant imparlance.
S. C. 3. Salk. 276.
S. C. 1. Ld. Ray. 674.
S. C. Holt, 559.
S. C. Lilly Ent. 51.

Cafe 766.

Anonymous.

AN AFFIDAVIT for changing a *venue* was, "that the cause of action, if any, did arise in the county of *L.* or in some other than in that in which the plaintiff laid;" and it was insufficient, for it ought to fix it to a certain county; and at this rate *venues* might be changed almost in *infinitum*.

An affidavit to change the *venue* must fix it in some certain county.
Sellon's Pract. 261 to 267.
Tidd's Pract.

Cafe 767.

Anonymous.

WHEN ONE is put to answer interrogatories, the prosecutor has four days to exhibit, by the Rules of the Court.

Interrogatories.

Cafe 768.

Anonymous.

PER CURIAM. In respect to seamen's wages, the usage is, if the ship be lost before arrival in the *port of delivery*, they lose their wages out. If she arrive safe in port, and is lost in her homeward voyage, they have their wages out, but lose the home-sailors lose their wages. If they run away after arrival in port abroad, they lose their wages.

If a ship be lost or deserted between the ports of *delivery* and *destination*, the sailors lose their wages.
Ante, 408, 409.

* [443]

* Gidley against Williams.

Cafe 769.

DEBT UPON A BOND by administrator, naming himself administrator of *J. S.* deceased, without saying "*bonorum et tallorum, jurium et creditorum*," as the usual course is, and without saying as much as "*cui administratio commissa fuit*," but concluding *proferat in cur. literas administrat. Non est factum*, and verdict for the plaintiff.

Debt on a bond as administrator, not saying by whom it was committed, aided by pleading *non est factum*.
S. C. 1. Salk. 37. S. C. 1. Ld. Ray. 634. Ante, 436. 1. Ld. Ray. 109. Cowp. 825. 3. Term Rep. 25.

AND

Hilary Term, 12. Will. 3. In B. R.

AND MOVED *in arrest of judgment*, that the plaintiff had not made himself any title to the action.

GIDLEY
against
WILLIAMS.

FIRST, Because it was not said *qui obiit intestat*.

SECONDLY, Not said of what administration was committed to him, or of what the plaintiff was administrator, whether of his goods and chattels, debts, &c. and administration may be qualified as of chattels real only, or chattel in possession, and not of debts; of debts, and not of debts by bond, &c. So it ought to appear what the plaintiff was administrator of.

THIRDLY, Not alleged that administration was committed to the plaintiff, and by whom.

AS TO THE FIRST, It ought to have been said *qui obiit intestat*. or at least, that administration was committed to him, which strongly implies a dying intestate; and the diversity of entries is observable, when an action is brought by an administrator, and when against him; in the one the allegation is absolute, *qui obiit intestat*; in the other it is qualified, *qui obiit intestat ut dicitur*; and if it be asked, what it is that is the foundation of this action, it will be answered to be the original bond, and the administration committed to the plaintiff; and if either fail, the action must fail: And a verdict will not help the want of that which is absolutely necessary to shew cause of action, and cannot be matter of evidence upon the issue. And for the necessity of shewing that administration was committed to the plaintiff, were quoted 2. Vent. 84. 1. Sid. 228.

BUT PER CURIAM, after several arguments, The defendant, by 2. Cro. 124, 125. pleading in chief, has cured all the faults of the declaration, notwithstanding the case of *Cope v. Lewin (a)*.

And HOLT, Chief Justice, quoted the case of *Lord Mobun v. Archer* in the common pleas, *Trinity Term 1657*, the report whereof *penes se habuit*, and belonged to my LORD BRIDGMAN; Vide 1. Vent. it was an *assumpsit* by an administrator, and no *proferat of literas* 222. it is but *administrat*; non *assumpsit* pleaded, and held that the fault was form. helped after plea; and the authority of the case of *Cope v. Lewin* denied. Vide *Dennison v. Monson (b)*, where the pleadings were the same as * here. And after plea, the plaintiff had judgment; which was after affirmed upon writ of error; and without doubt, if it had not been aided by the plea, yet it would have been well by the statute of 16. & 17. Car. 2. * [444]

And the plaintiff had judgment.

(a) Hob. 38. S. C. 1. Brownl. 9.

(b) Stiles, 106.

Cafe 770.

Collins *against* Benning.

The statute of Limitations cannot be pleaded to *indebitatus assumpsit* to pay on demand. S. C. 3. Salk. 227.

IN an *indebitatus assumpsit*, the plaintiff declared on a promise to pay on demand; and *non assumpsit infra sex annos* pleaded:

To which the plaintiff demurred; because declaring on a promise on demand, he thought nothing was due till demand; and he should have pleaded *non assumpsit infra sex annos* after demand, or that no demand was within six years.

PER CURIAM. If the promise were for a collateral thing, which would create no debt till demand, it might be so (a); but here it is an *indebitatus assumpsit*, which shews a debt at the time of the promise, therefore the plea is good.

Jud. nisi for the defendant.

(a) Bull. N. P. 151.

Cafe 771.

Sarah Griffith's Cafe (a).

Whether fines and recoveries, by *feme covert* under age, may be vacated. Notice thereof to be given to a purchaser. 12. Co. 124. Dyer, 220. 3. Lev. 36. Skin. 23.

SEVERAL precedents were produced of fines, recoveries, and declarations of uses thereupon being vacated on motions, because of their being by *femes covert* under age. And one of the rules produced was, that the *feme* should not be admitted to levy any more fines till she came of age. And another, that the Counsel, who had advised it, should be fined fourteen pounds, because no writ of error could lie. And another, the husband be fined one hundred pounds. And in the case of *Sir Robert Marsham*, a six clerk, procured his wife under age to levy a fine; and being sent for into court, he was fain to deliver the fine and deed of uses to be cancelled in court.

* [445]

Feme covert outlawed, discharged on motion.

2. Vent. 69.

2. Brownl. 279.

And per POWELL, Justice, If the commissioners, before whom the fine was taken, knew the *feme* to be under age, they are fineable: But there are no precedents of *vacats* of this kind antienter than the fourth year of *James the First*. But the true antient way was to bring a writ of error; but because the husband would not join in a writ of error, &c. this way was introduced: And some Books say, that if a *feme covert* be outlawed without her husband, there is no remedy for * her; but now in such case the Court will discharge her upon motion. But in this case there appears that there is a purchaser, and therefore we ought to be well advised. But in regard the *feme* is to be of age in two or three days time, let us *de bene esse* examine her age by affidavits and inspection: and that was done, and the inspection entered on record; and the rule was to see precedents, and give notice to the purchaser,

(a) This case was in the Court of Common Pleas.

Anonymous.

Hilary Term, 12. Will, 3. In B. R.

Anonymous.

Case 772.

THE COURT will not make a rule for naming a good lessor in ejectment, unless there were a nonsuit, or verdict against the plaintiff, in a former trial (a).

(a) See Stra. 694. 932. 1. Will. 130. Jeant Runnington's Treatise on Ejectment, 188. 190. 3. Burr. 1801. 4. Burr. 188. 190. 1997. 1. Term Rep. 491. and Mr. Ser-

Anonymous.

Case 773.

THE COURT may grant a prohibition to a court pretended; and also where it is doubtful whether it will lie or not.

Prohibition to a pretended court. Ante, 438.

Anonymous.

Case 774.

THE COURT sometimes will make a rule on the old sheriff to indent with his successor.

The King *against* Luellin.

Case 775.

THE DEFENDANT was master of the *Bell Inn*, in *Bristol*. He was indicted for not receiving one taken ill with the small-pox; and it was quashed, for not saying he was a traveller.

Indictment against an inn-keeper for not receiving a sick person, must state he was a traveller.

EASTER

E A S T E R T E R M ,

The Thirteenth of William the Third,

I N

The King's Bench.

Sir John Holt, Knt. Chief Justice.

Sir John Turtou, Knt.

Sir Lyttleton Powys, Knt.

Sir Henry Gould, Knt.

Sir Thomas Trevor, Knt. Attorney General,

John Hawles, Esq. Solicitor General.

} *Justices.*

* [446]

Case 776.

* Anonymous.

Indictment at
common law
determines his
election to
prosecute for it
on a statute.
Post 502.

IT was moved to quash an indictment, which was for entering into a warren, and hunting and killing rabbits at night.

The exception was, that by the statute of 3. Jac. 1. c. 13. the offender forfeits treble damages and costs, half a year's imprisonment, and to find security for his good behaviour for seven years: and the indictment not concluding *contra formam stat.* the punishment of the statute cannot be inflicted; and if the defendant be fined upon this indictment, he may be notwithstanding again punished according to the statute, and so *his pro eodem delicto*.

Vide 1. Inst.
145. a. 146. a.

Sed non allocatur; for if one has two remedies, the one by act of parliament, and the other by common law, and takes one of them, he thereby determines his election.

Case 777.

Anonymous (a).

Joint traders are
jointly charged,
unless special
agreement.

FIRST, If there be several joint partners, and one has dealing generally with one of them in matters concerning their joint trade, whereby debt is due to him, it shall charge them jointly,

(a) At nisi prius before Holt, Chief Justice.

and

Easter Term, 13. Will. 3. In B. R.

and the survivors of them; but if in that case one had rather deal ANONYMOUS.
with one of them upon his own account, he must make his
agreement specially, in which case the debt shall be only his and
his executors, and shall not survive (a).

SECONDLY, If one or more of the joint traders become Bankrupt.
bankrupt, his or their proportions only are assignable by the com-
missioners, to be held in common with the rest who were not
bankrupts (b).

THIRDLY, If there be an act of bankruptcy committed, Commission of
bankruptcy
avoids a judg-
ment after bank-
ruptcy commit-
ted.
and a creditor obtains a judgment subsequent to it, then a
commission is taken out; now the judgment is thereby
avoided.

* FOURTHLY, If there be several joint traders, payment to one
of them is payment to all. So if they all, except him to whom * [447]
the payment was made, were bankrupts, the payment is only Payment to one
partner is a pay-
ment to all.
unavoidable as to his proportion; and if there be four partners,
whereof three are bankrupts, and their shares assigned, and a pay-
ment is made to him that was no bankrupt, it is a payment to all
the assignees, for now they are all partners.

- (a) See Watson on Partnership, 335. Chan. Cases, 139. Heydon v. Heydon,
(b) See Jacky v. Butler, 2. Ld. Ray. 1. Salk. 392. Richardson v. Goodwin,
871. Backhurst v. Clinkard, 1. Show. 2. Vern. 293. Fox v. Hanbury, Cowp.
173. Lord Craven v. Widdows, 2. 448. and Cooke's B. L. 3d edit. 597.

Anonymous.

Case 778.

A BILL OF EXCHANGE was directed to A. or, in his ab- Bill of exchange.
sence, to B. and begun thus: "Gentlemen, pray pay."
The bill was tendered to A. who promised to pay it as soon as he
should sell such goods; and in an action against him for
non-payment, the declaration was of a bill directed to him with-
out any notice of B.

HOLT, Chief Justice, held it well.

SECONDLY, That the acceptance was a conditional accep- Conditional ac-
ceptance.
tance (a).

But here the action being by an executor, and upon a debt laid Acceptance
must be in the
testator's life-
time.
to be due to the testator, he held it necessary to prove that the
acceptance was in the testator's time.

- (a) See Smith v. Abbott, 2. Stra. Julian v. Shobroke, 2. Will. 9. Sprout
1152. Banbury v. Liffett, 2. Stra. 1211. v. Mathews, 1. Term Rep. 182.

Anonymous.

Case 779.

HOLT, Chief Justice. Every master of a ship may detain Master has a
lien on the car-
go for the
freight.
goods till he be paid for them; that is, for their freight (a).

- (a) See Rex v. Sims, post. 511.

Turton

Easter Term, 13. Will. 3. In B. R.

Cafe 780.

Turton *against* Reiner.

Declaration in prohibition.

IF a declaration in prohibition be by him who sued the prohibition, and no plea be put in in due time, the plaintiff may have judgment by *nihil dicit, ideo stet prohibitio*; but if it be of the other side, and no plea, there shall be likewise a *nihil dicit*, and a consultation.

Cafe 781.

Pickering's Cafe.

Assignment of bail taken by sheriff, may be refused.

PER CURIAM. Let the bail taken by the sheriff be ever so good, yet the plaintiff may refuse an assignment of it, and proceed against the sheriff by amercements; therefore it behoves him to take good bail. It is true, the sheriff shall not be brought in contempt for not bringing in the body; but the only way is to amerce him, and sheriff may proceed on the bail-bond: And the plaintiff, by 23. *Hen. 6. c. 10.* has election of *bail* or *amercement (a)*.

(a) But see 4. & 5. Ann. c. 16. f. 20. Salk. 99. *Rex v Dawes*, 1. Lord Ray. Lord Brook v. Stone, 1. Will. 223. L. 722. Seldon's Praesice, 1. vol. 183, 186.

* [448]

Cafe 782.

* The King *against* Foster.

Appearance to indictment is only to the end of the Term; to civil action to the end of the suit.

FOSTER was indicted for a battery; after appearance agreed with the prosecutor, who promised to cease all proceedings on the indictment; but notwithstanding, the defendant not appearing the next Term was sued to an outlawry.

HOLT, *Chief Justice*. The only sure way had been, upon agreement with the prosecutor, to have submitted to a fine, which in that case would have been moderate, or to get a *non prof.* entered. And an appearance to an indictment differs from appearance in a civil action; where once an appearance, it is an appearance to the end of the suit; but an appearance to an indictment is of course but of that Term, and then if it be not prosecuted, then the defendant is out of court the next Term, and may be outlawed; and the outlawry is a conviction while it stands unreversed: And your only way now is to submit to a fine upon the outlawry. You might have got an attorney to appear for you upon the new act of parliament.

Cafe 783.

Lord Anglesea's Cafe.

Appearance for keeping the peace, not discharged till the end of the Term, unless Attorney General desires it.

LORD ANGLESEA stood upon his recognizance for his keeping the peace towards his lady (a).

(a) See Marquis of Carmarthen's Cafe, Foster, 359. Lord Vane's Cafe, Stra. 1202. Earl Stamford's Cafe, B.R.H. 74. Earl Ferrers' Cafe, Burr. 631. 703.

Lord Howard's Cafe, 11. Mod. 109. Lady Strathmore's Cafe, 1. Term Rep. 696.

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IT WAS MOVED to have his attendance discharged in regard of his ill state of health, he spitting blood, and advised to go beyond sea for his health. Lord Abbot's Case.

PER CURIAM. By the course of the Court one is never discharged so till the last day of Term, without the ATTORNEY GENERAL comes and desires it, though it may absolutely be done, his attendance being *de die in diem*. 2. Hawk. P. C. ch. 60. s. 17, 18.

And the Court ordered them to produce affidavits of the truth of what was offered, and to move it again.

Willmott against Tiler.

Case 784.

BEING arraigned on the appeal before, and having had time to plead, he was committed, as before is said (a); and being brought in at another day, he put in his special plea, and was remanded: and at another day it was made a *concilium* in his absence, which might well be, because it was only to assign a day for Counsel to argue the point.

The special plea of *autrefois acquit*, pleaded to an appeal of murder, may be made a *concilium* in the absence of

the appellee. S.C. ante, 416. S.C. Ld. Ray, 671.

S.C. Salk. 63.

* And now it appeared on *oyer* of the writ, that there were not fifteen days between *the teste* and *the return* thereof; so the plea was, *protestando* that the appellee ought not to answer the writ for want of sufficient number of days between its *teste* and return, *pro placito dicit*, and sets forth the indictment before the GRAND JURY, &c. and a *capias* thereupon at large directed to sheriff of London, by virtue whereof he was taken, &c.; that at the gaol-delivery of Newgate at THE OLD BAILEY Justice-Hall in the parish of, &c. London, *coram* such and such *ass. et sociis suis*, Justices of gaol-delivery of Newgate, the indictment was delivered in; and that he the appellee was by the sheriff of London brought into court, and sets forth his arraignment, and plea of not guilty *per patriam*; that a jury was then and there impanelled, *viz. A. B. &c.*; that the jury found him guilty of *Manſlaughter*; that he was immediately asked what he had to say why judgment should not pass; that he prayed his clergy, which was allowed him; that he then and there read as a clerk, and was burnt in the hand, and confined eleven months by the Court; and avers identity of persons, wound, &c. and so concludes that he ought not to be put to answer again.

* [449]
A writ of appeal with less than fifteen days between *the teste* and *the return*, is cured by the appearance of the defendant, and his pleading to it in *chief*, for it is a defect that can only be taken advantage of in *abatement*.
1. Salk. 59.

To this there was a demurrer, and a joinder in it.

FIRST OBJECTION. That it appeared that the Judges, before whom the trial was, were Judges of Gaol-Delivery of Newgate; and it does not appear the defendant was in the gaol of Newgate.

(a) Ante, 416.

ANSWER.

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A plea in bar of an appeal, stating the trial before Justices of gaol delivery, is good, although it do not shew the appellee was in THE GAOL. Anie, p. 114.

ANSWER. That objection would destroy all proceedings at the gaol-delivery. The indictment is found before justices of the peace, and by them sent to the Justices of gaol-delivery; and the commission runs for Justices of gaol-delivery for *London*, and another for *Middlesex*. And the current of precedents is, that the party came in in custody of the sheriff, *cujus custodia ex causâ præd. commiss. fuit*; and since he says he was in custody of the sheriff of *London*, and since *Newgate* is the county gaol both of *London* and *Middlesex*, we shall intend him in the sheriff's custody in *Newgate*, as by law he ought to be: and we must intend *Newgate* to be the county gaol, for that it does not appear to be a franchise; and that objection has been frequently over-ruled.

The words "Farringdon" "without" do not import that the ward is out of the county of the city of *London*.

SECOND OBJECTION. The *Old Bailey*, where the Court is said to have been kept, is said to be "*in parochiâ, &c. in wardâ Farringdon extra London.*" which is nonsense.

* ANSWER. The ward of *Farringdon extra* is the name of the ward, and "*extra*" does not denote it to be out of the county of *London*, but is for opposition to *Farringdon* within the City [450] walls.

Justices of gaol delivery may try at the *Old Bailey*.

THIRD OBJECTION. Justices of gaol-delivery cannot try any indictment but what is found before themselves.

ANSWER. It was so at common law, but altered by the statute.

Verdict not guilty of the felony and murder, but guilty of manslaughter is good.

THE FOURTH OBJECTION. The verdict as pleaded is contradictory, for they say he was acquitted of the *felony* and *murder*, and afterwards that he was found guilty of *manslaughter*, which is felony.

ANSWER. That might have been said better; but it must be understood, that they found him *not guilty* of the felony and murder *prout*, but *guilty* of felony and manslaughter.

Error in a writ of appeal not cured by pleading to it: 1. Salk. 59.

THEN IT WAS INSISTED ON, that though the writ were naught, for the want of the due number of days between the *teste* and return, yet now the defendant not having pleaded it in abatement, but taken it by a *protestando*, he had waived the advantage of it.

BUT TO THAT it was answered of the other side, that since it appeared to the Court by the *oyer* on record to be vicious, they must, *ex officio*, take notice of it.

An appellee, after pleading in chief to a bad writ, cannot take advantage of its defect in abatement.

THEN IT WAS INSISTED ON, that by pleading in CHIEF he had admitted the writ good; for if he had pleaded in *abatement*, he should not plead in chief till the matter in abatement were determined; for by pleading in chief at the same time, he would

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would have waived the abatement; and for this 7. *Edw.* 4. 15. *a.* was strongly insisted on.

WILLMOTT
against
TILER.

But note, That book only says, that where he pleads such matter in abatement, which denies the appellant's right of appeal, as that he is a bastard, or that another is heir, he ought not to plead in chief, because such a plea would admit him capable of suing contrary to the plea in abatement; but in that very case, by the Serjeants at bar, he may plead over *in favorem vite*.

1. Salk. 59, 60.

And so THE COURT held here, was the constant course for expedition; and the book of 7. *Edw.* 4. 15. agrees he ought to plead over, where he does not deny the appellant's title to the action, which is not done here.

It was then objected, that this trial was now above a year ago; and they conclude "*prout patet per record.*" in THE OLD BAILEY," whereas by an act of parliament all the records of gaol delivery are to be removed into the exchequer, into the custody of the * treasurer; and though a record be not local in itself, yet if they plead it in a certain place, we may traverse it.

An appellee may conclude a plea at bar to AN APPEAL, with a *prout patet per recordum* in such a court, although a year has expired since the trial of the INDICTMENT.

* [451]

HOLT, *Chief Justice*. Suppose they do not remove the record, shall that turn to the prejudice of another? And that act of which you speak is grown obsolete, for indeed they do for the most part remove them into this Court; and if you pleaded *nul tiel record*, a *certiorari* would go to the Judges of gaol delivery; and if they did not certify a record, then it were for your advantage. And he remembered a case of appeal, where the appellee pleaded a false addition in abatement, *viz.* that he was an inhabitant of *A. absque hoc*, that he was an inhabitant of *B.* as it was laid; and he was ordered to answer over to the charge; and though he might have pleaded a conviction of manslaughter, and allowance of clergy, yet to lie open to the appeal he pleaded not guilty; and it came to trial on both issues; and as to the issue of no: guilty, he was found guilty of manslaughter; and the other found specially, that the appellee was accidentally at *B.* and not otherwise an inhabitant there; and so the question was, Whether he could be said to be an inhabitant at *B.*? but that point never received any determination: but the constant practice is to lay him an inhabitant where the fact is committed: and *in favour of life* he may plead a special matter in bar, and not guilty too; but for expedition's sake, if he plead in abatement, the Court will make him plead in bar besides; and the being of *oyer* of the writ, makes it part of the record.

And PER TOTAM CURIAM, The conviction of manslaughter and clergy is a good bar of the appeal, without dispute (*a*).

A conviction on an indictment is good bar to an appeal.

(*a*) 1. Salk. 63.

But

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If a writ of appeal be bad, and the appellee pray over and then plead in bar of the appeal, final judgment shall be given for the defendant on the plea in bar, and not against the appellant on the writ.

BUT PER CURIAM, The only doubt is, whether we shall give judgment on *the writ*, or on *the plea in bar*; for if we give it on the bar, and the writ be insufficient, our judgment will avail nothing, according to *Vaux's Case (a)*; for it will be no more than an acquittal upon a bad writ, and then they may arraign him again; and though *Vaux's Case* be after verdict, and this upon a demurrer, that makes no difference.

BUT HOLT, Chief Justice, If *Vaux's Case* were *res integra*, it would deserve consideration.

And at another day, PER CUR.

HOLT, Chief Justice, delivering their opinion: WE ALL AGREE that judgment final ought to be given: for though clearly the writ is bad for want of fifteen days between the *teste* and the *return*, so as if *non est inventus* had been returned, and the defendant sued to an outlawry, it had been erroneous; yet since he appeared to it, and pleaded in chief, he has lost that advantage; for the reason why there ought to be fifteen days between the *teste* and return * appears upon consideration of the statute of *Articuli super Chartas*, c. 5. 2. *Inft.* 567. by which statute it is necessary there should be fifteen days between the *teste* and the return of writs; and thus it was antiently, for they computed one might travel twenty miles a-day, and therefore they held fifteen days journey sufficient to come from any part in *England*, and for this a day's journey was called *Dieta (b)*. And the reason was, that party might have sufficient time to appear and prepare an answer; and if the process was too streight, it was erroneous; but if the defendant, by appearing and pleading in chief, dispense with this favour, he may, and thereby make the writ good. 9. *Edw.* 4. 18. 12. *Edw.* 4. 11. A *scire facias* upon A FINE wanted the due number of days between the *teste* and return, and that writ did partake of the nature of a real action; yet if the party appeared and pleaded to it, it made it good. If a writ of covenant to levy a fine want fifteen days between the *teste* and return, yet if party appear, and fine be levied, it is good. This indeed has been afterwards questioned by some Judges, but was adjudged to be a stated doctrine, and needs no new settlement; for if the defendant appear and answer, without taking advantage of this fault of the writ, as if it were in *Assize*, and be not attached fifteen days before, the fault of the writ is thereby cured.

Et sic PER CUR. *Jud. pro defendente* upon the plea in bar.

On judgment in favour of an appellant on a bad writ, he may be committed to the marshall's, Salk. 61. Stra. 858.

Notwithstanding, the appellant's Counsel moved *instantur* for leave to charge the defendant in custody of THE MARSHAL, the judgment being in bar upon a bad writ, according to *Vaux's Case*.

(a) 4. Co. 39.

(b) Britt. 135. 138.

At

Easter Term, 13. Will. 3. In B. R.

At which THE COURT was very angry, for it was to arraign their judgment to their face, but said they could not help it; and the motion was granted; but *materia dormivit*. WILMOTT
against
TILER.

HOLT, *Chief Justice*, occasionally in this case said,

FIRST, That a clerk in orders, upon his having his clergy, shall not be burnt in the hand. Clerk not to be
burnt in the
hand.

See 4. Hawk. ch. 33. ; the Statutes 10. & 11. Will. 3. c. 23. ; 5. Anne, c. 6. ; 19. Geo. 3. c. 74.

SECONDLY, That none could have the benefit of his clergy twice except a clerk. A clerk may have
clergy twice.

4. Hawk. P. C. ch. 33. page 25. 4. Black. Com. 360.

THIRDLY, That in all cases before 18. Eliz. c. 7. where a clerk had clergy, he was delivered to THE ORDINARY, but in no case since. Clerk delivered
to the ordinary.

See Hale's Summary, 240. Kely Rep. 25. 2. Hale; 382. Staund. P. C. 137. Dyer, 214. 4. Hawk. P. C. 7th edit. ch. 33. f. 117, 118, &c.

FOURTHLY, That where one in orders has his clergy, there ought to be a special entry made why he was not burnt in the hand; and if he be clerk in orders or not, is triable by his ordination. Entry where a
clerk is allowed
clergy.

FIFTHLY, That if a clerk shew his ordination, he need not have the book, because it is presumed a clerk in orders can read. Clerk shall be
presumed literate.

2. Hale P. C. 372. 4. Black. Rep. 360.

SIXTHLY, That in the time of *Edw. 3.* clergy was denied to one not having *habitus et tonsuram*. Habitus et tonsuram.

2. Hale P. C. 372. 4. Black. Rep. 360. 4. Hawk. P. C. ch. 33. f. 5.

* SEVENTHLY, That by 1. *Edw. 6. c. 12. § 14.* Peers to have benefit of clergy without burning in the hand (a), though they cannot read. Peers to have
clergy.

* [453]

(a) See the Ducheſs of Kingſton's Caſe. 21 State Trials, 262. 4. Hawk. P. C. ch. 33. page 250.

Anonymous.

Caſe 785.

REPLEVIN by plaint in an inferior court was removed hither by *certiorari*; and upon the removal the plaintiff changed his declaration. On removal of
replevin into
B. R. by certiorari, the declaration cannot be changed.

PER CURIAM. That cannot be, for whatever is below ought to be now here. And if one remove a replevin by *recordare* hither, and declare for leſs than he took, the defendant muſt avow for them, and alſo for what he has not declared on; and if he has return, he ſhall have it for all. And if one replevy part of the goods taken, the other ſhall avow for them and the reſt alſo, and have return, if his avowry go for him, for all. And this *certiorari* removes the pledges below, ſo as *ſcire facias* 3. Mod. 58. may go againſt them. And the entry here above, in this caſe of removal of replevin by plaint, ought not to be of a *ſummonitus* ſuit, as upon an original, but as of a cauſe removed. Ante, p. 430.

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H h

The

Case 786.

The King *against* Ford.

On a summary conviction, the Court will intend that the defendant was summoned. *1 Stra. 261. 608.*

FORD was convicted in a summary way on the statute of deer stealing (a). To which it was objected,

FIRST, That it did not appear on the record, that the defendant had any notice to come and make his defence; and *citatio est de jure naturali*, that none be convicted without an opportunity of making defence.

Quod CURIA concessit. But this being by persons by law intrusted with the administration of justice, we will intend they have proceeded regularly and legally, if the contrary appear not (b).

SECONDLY, It is not shewed to be the offence described by the statute; for it is not said that deer were usually kept there for ten years before (c).

PER CURIAM. If that be notoriously known, it need not to be averred.

THIRDLY, It is said we killed the deer, without consent of the owner, on such a day; so they tie up the want of consent to the day, and that is ill, for the consent might have been given the day before to kill the deer the next day, and then it would be a lawful killing, though in strictness without the owner's consent on that day.

But PER CURIAM, A consent to-day to kill a deer any day for a month, is a consent for every day until it be executed or revoked, which cannot be * till notice.

LASTLY, It was moved to stay the affirming the conviction, though affirmed, though the witness was indicted for perjury.

tion, because there was an information for perjury against the witness on whose oath it was, until that were tried.

Sed nihilominus it was confirmed.

(a) The statute 3. & 4. Will. & Mary c. 16. But this statute is repealed, and other provisions enacted by 16. Geo. 3 c. 30. — See 1. Hawk. P. C. ch. 46.

(b) Rex v. Simpson, 1. Stra. 44. Rex v. Theed, 1. Stra. 608. S. C. Lord

Raym. 1375. S. C. 8. Mod 319. Rex v. Johnston, 2. Stra. 261. Rex v. Aiken, 3. Burr. 1785.

(c) See Rex v. Calcutt and Marli, 2. Stra. 1119.

Case 787.

Kilderton *against* Wilkenfon.

Attachment shall go against under-sheriff for sheriff to make a return, and failure therein, an attachment was granted against him;

AN under-sheriff returned a *fieri feci*, and a *venditioni ex-ponas* was sued out. After two or three rules upon the sheriff to make a return, and failure therein, an attachment was granted against him;

THE COURT declaring they never would grant it against the high-sheriff for not returning the writ. And such a rule the same Term in the like case against the under-sheriff of York.

Pocock

Pocock *against* Thornicroft.

Cafe 788.

LEAVE was granted to file an information against the defendant for inveigling away the plaintiff's wife, and procuring merchants and tradesmen to sell her goods, in order to saddle the husband with the debt, agreeing with the seller to deliver him the goods again. An information lies for inveigling a man's wife, and giving her credit with a view to charge the husband.

Anonymous.

Cafe 789.

AWIFE shall be admitted to swear the peace against her husband, because a matter concerning her person (a).

(a) See Lord Anglesea's Case, ante, Lord Vane's Case, Stra. 1202. Lady 448. Sims' Case, 2 Stra. 1207. Marquis Carmarthen's Case, Foster, 359. A wife may swear the peace against her husband. Strathmore's Case, 1. Term Rep. 696. *mis.*

Anonymous.

Cafe 790.

PER CURIAM. When a cause is removed from London, the real record never removed from London. The real record never removed from London. the very record is never removed; because they expect a *precedendo*.

Anonymous.

Cafe 791.

PER CURIAM. One has four days to move in arrest of judgment after the coming in of THE POSTEA; but defendant at his peril must watch its coming in. Four days to move in arrest of judgment.

1. Selton's Practice, 521. Taylor v. Whitehead, Dougl. 745.

Mason *against* Atherbury.

Cafe 792.

HE gave a bond for his true imprisonment, and after escaped, and THE MARSHAL assigned the bond to the plaintiff, who sued it to judgment; the obligee brings in the original defendant, and the marshal accepts him. Forfeiture of bond.

And PER CURIAM, He by the acceptance has dispensed with the forfeiture of the bond.

* [455]

* Anonymous.

Cafe 793.

PER CURIAM. If justices of one county make an order for the removal of a poor person into another county, the appeal belongs to the justices of the county where the order was made. And if orders be removed hither, and before it be quashed the justices make a new order, it is a contempt; and the order is not quashed till a rule be absolute. Appeal against an order of removal must be to the sessions of the county in which the order was made.

See 2d vol. of Mr. Conit's edit. of Bott's Poor Laws, ch. 13. page 819. to 869.

H h 2

Thorp

Cafe 794.

Thorp *against* Thorp.

If A. (having mortgaged certain lands to B. agree to make a release of his equity of redemption, in consideration of which B. agrees to pay A. the sum of seven pounds, the making of the release is a condition precedent to the payment of the money.

S.C. Comy. 98.
S. C. 1. *Ld. Ray.*

235. 662.

S. C. Holt, 28.

96.

S. C. 1. Lut.

245.

S.C. N. Lut. 75.

S. C. 1. Salk.

171.

1. Roll. Abr.

414.

1. Vent. 177.

214.

4. Bac. Abr. 290.

Cases T. T. 164.

Dougl. 688.

1. Stra. 458.

534-569. 571.

2. Burr. 900.

1. Term. Rep.

645.

4. Term. Rep.

761.

* [456]

ERROR from the court of common pleas of a judgment in an action on the case, wherein the plaintiff declared, that the defendant had and held of him, by way of mortgage, two closes of copyhold lands; and that there was a discourse between them concerning the plaintiff's releasing his equity of redemption therein to the defendant, and concerning divers sums of money due from the plaintiff to the defendant upon the said mortgage; upon which the plaintiff did agree with the defendant that he would release to him the said equity of redemption, in consideration of which the defendant did agree with the plaintiff to pay him seven pounds above all that was due; and that, in consideration that the plaintiff promised the defendant to perform all of his side, the defendant promised the plaintiff to perform of his side; and avers that he did perform all on his, the plaintiff's side, but that the defendant paid one pound seven shillings of the said seven pounds, and no more, &c.

To this the defendant pleads in bar, that long after the promise, viz. 29 July 1694, the plaintiff did, by indenture made between him and the defendant, release to the defendant "all manner of actions, suits, debts, duties, sum and sums of money, and all demands whatsoever, which ever he had, or he, his heirs, executors or assigns ever should have, for or by reason of any thing, matter or demand whatsoever."

Upon *oyer* of this deed of release, it recited the said mortgage, and released "all provisos therein, and all his estate, right, title and interest in the said close, both in law and equity;" and then follows the foregoing clause (a).

And upon this the plaintiff demurred, and judgment for the plaintiff in the court of common pleas.

COWPER for the plaintiff in error objected to the declaration, That the consideration set forth in it was not sufficient to support a promise (b); for though equity of redemption be a thing pretty well known, and for the most part valuable, yet some may be not of any value, and this may be of them; and therefore it was necessary to shew that it was of some value; and for an example of an equity of redemption without value, he put this case: If a mortgage be till so much money be raised by the mortgagee out of the profits; here the mortgagor has an equity of redeeming by payment of the money and charges, and yet it is of no value to the other to have it released; but to the contrary, the redemption there would be rather a benefit to him.

(a) See the pleadings in the case, Lutw. 204. 1 Com. Dig. "Action of Assumpsit" (B).
245. 3. Lord Ray. 341.

(b) See 2. Black. Rep. 320. Cowp.

SECONDLY,

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SECONDLY, He objected, that it did not appear by the count that the mortgage was forfeited, and then the plaintiff had no equity of redemption. *Ergo* no consideration for the promise, *Ergo*, &c. *Vide 2s Saund. 136. Style 248.*

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Then the plea in bar is good, for the release is full in words, and subsequent to the promise. But say they, the money was to be paid in consideration of the release; therefore the release, which created the duty, cannot *in eodem instanti* extinguish it. To this I answer, that the payment of the money does not arise from the release, but from the promise; and the promise, and not the release, being the consideration of the debt, action lies upon the mutual promises before the release. *Ergo* the release comes after the cause of action, and consequently destroys it. *March 75.* Where promises are their own mutual considerations, there needs no performance to support the action. *Hob. 88.* In consideration that the plaintiff promised to deliver the defendant a cow, the defendant promised the plaintiff fifty shillings; in an action for the money there needs no averment of delivery of the cow or *vice versa*. *Cr. El. 343.* A declaration, that in consideration *A.* was indebted to *B.* by bills, and that he promised to deliver him up the bills, he promised to give him good security by bond for the money, and avers the delivery of the bills; the defendant traverses the delivery, and on demurrer adjudged against him, because not material; and it was not the consideration of the *assumpsit*, but the promise to deliver was it. *Cr. El. 704. simile (a).*

But *Cr. El. 889.* the promise is, *super solutionem* of such a sum, to do, &c. therefore the thing not demandable before payment. So is *Cr. Car. 19.* So that if here the cause of action did arise upon the promise before any release made, the release subsequent clearly discharges it; *scilicet* not if there were no more in the case. * And if the release be what gives them cause of action, then they should shew a release made, or a tender of it; and not generally, as here, that they have performed all of their side.

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But it is objected, That although an action had accrued to the plaintiff immediately upon the promise, yet this release should not discharge it; for that the release shall be taken according to the intent of the parties, which was only to discharge the equity of redemption; and the general words of it shall be restrained and qualified by the foregoing special words. But I answer, that after releasing the equity of redemption by express words, there are in the self-same clause general words of "all actions and demands;" which I agree are qualified by the special words and intent of the parties. And then comes the clause in question, distinctly and

Vide 1. And. 64.
3. Cro. 182.
Hedley, 15.
9. Edw. 3. 43.
2. Roll. Abr. 393.
Hob. 74.
Dy. 240.
2. Roll. Abr. 396.
Hob. 275.

(a) See *Pordage v. Cole*, 1. Saund. 319. *Dougl. 684.* *Kingston v. Preston*, Dougl. 689. *Goodison v. Num*, 4. Term. Rep. 763. *Duke of St Albans v. Shore*, 1. Black Rep. 1312. *Jones v. Barkley*, H. Bl. Rep. 270.

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separately from the first, releasing "all actions and demands;" and this clause would be entirely useless if they be applied to the first, because the first has a general clause in itself to serve it as a wall or muniment, and so stands in no need of any more. 2. *Roll. Ab.* 489. The general words, that are restrained by the special words, are part of the same clause and sentence, and not, as here, distinct and separate. 3. *Mod.* 277. Suppose *A* recited in a deed, that whereas *B.* owes him ten pounds, and releases thereby "the said ten pounds, and all actions and demands," and further proceeds and releases him "all debts, duties, actions, and demands," would this last clause be rather entirely rejected than extended to any thing but the ten pounds? and upon this diversity *Hetty, 9.* and 15. *Aubry's Case*, is distinguishable from the present case.

CHESTER contra. As to the want of averring that we have made a release, they in their replication shew that we have done it, and set it forth; and that supplies that defect, if any; for many times the fault of a declaration may be helped by the defendant's plea; as the want of a *venue* by pleading a release. *Cro. Eliz.* 68. Debt upon a bond, and it did appear by the bond that the day of payment was not yet come; the defendant pleaded a release, and found against him, and plaintiff had judgment; for that by pleading the release he waived the other advantage; and 9. *Idem*. 4. c. there cited, Debt by an executor; the defendant pleaded, that the testator had made two executors, and that one of them released to him; and issue thereupon found for the plaintiff, who had judgment, though the defendant might have abated the action, because he waived that advantage by his plea. 3. *Gre.* 111. 2. *Krb.* 766. 1. *Veni.* 114. 126.

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And this Court will take notice what an equity of redemption is, as well as a court of equity of trusts and mortgages. 4. *Leon.* 225. 1. *Vent.* 41. That the Court will take notice of an equitable consideration; and we need not shew what our equity of redemption was, or how created. For first, They requested we should release such a thing to them; and it cannot be imagined they would do so if we had none. Indeed, if it had appeared to the Court that our equity was of no value, it would have been the stronger against us; though even so, there being something to be done by us, that would be a trouble to us, it would have been a good consideration of a promise. And if, in the case quoted out of *Saunders*, the heir had recited that he was bound by the bond, the Court would intend it so, and give judgment against him. And in all the cases that have been put of the other side, it did appear to the Court that there was nothing of value, or any pain or trouble to the plaintiff, to be the consideration of the promise; and there is a diversity between a thing's appearing not to be valuable, and its not appearing to be valuable; for a recital of it will help it in the one case, but not in the other. *Rogm.* 19. To make a promise good, the one party, viz. he that does promise, ought to have some charge or trouble by the performance, or the other some advantage.

And

*Admitted
to the Court*

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And the words of release are not sufficient to discharge the promise, because it was not in demand at the time of the release; for the release was a condition precedent, whereupon the demand did arise to the plaintiff; and therefore the release could not destroy that to which it gave birth.

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Vide Cro. Eliz.
837.
19. Hen. 6. 62.

But suppose an action did arise upon the mutual promises, yet each party had a reasonable time to perform; and perhaps each had time for his life, if not hastened by request; and neither is alledged here. Indeed the promise, as soon as made, was releasable by the word "promise," but not by the words "actions or demand," at least till a convenient time after; which is not alledged to have been between the promise and release.

And it is not absolutely necessary the words insisted on in this release must be rejected as fruitless, without they are extended to release this demand; for it may be, the mortgagee might be accountable to the mortgagor for some * of the profits of the lands, which might be released by the words.

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HOLT, *Chief Justice*. A release of an equity of redemption is a good consideration for a promise; and we can take notice of an equity of redemption, and that it is a valuable thing. But suppose it were not a thing valuable, and the case were this: *A.* is possessed of *Black Acre*, to which *B.* has no manner of right, and *A.* desires *B.* to release him all his right to *Black Acre*, and promises him, in consideration thereof, to pay so much money, surely this is a good consideration and a good promise, for it puts *A.* to the trouble of making a release. Then where the doing a thing will be a good consideration, a promise to do that thing will be so too; and though the want of an averment, that a release was made, would have been bad, if demurred to, yet it is now helped by going over and pleading. If one covenant to do several things in a certain deed agreed on, and in the end bind himself in a penalty for so doing, and debt is brought for the penalty, and shews generally, that he has done nothing of what is agreed on, this would be bad on demurrer, but a plea over cures it. So if one covenant, that if *J. S.* do such and such things that he will pay him so much money, *J. S.* brings action, and says generally, that he performed all the things, this would be bad on demurrer, but cureable by pleading over. Indeed, this being a general distinct clause, seems to diversify this case from all the cases before put, where the general words, restrained by the precedent particular ones, are in the same clause with the particulars.

Release of an equity of redemption is a good consideration of a promise.

Cowp. 294.

Where the doing a thing will be a good consideration, the promise of doing it will be so.

At another day this Term, after great consideration, THE WHOLE COURT came to one resolution, which was thus delivered:

HOLT, *Chief Justice*. We all agree, that the promise was not discharged by this release. It was urged at the Bar by MR. COWPER, that if the plaintiff might have founded an action upon the mutual promise and agreement before any performance on his

Release will bar an action where are mutual promises before performance.

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part, that certainly this release would have barred him; and the consequence is very true and necessary, if that were the case. And by the same reason, if he could not bring an action before such time as he had made a release, there is no colour for the release to bar him; for till he makes the release in this case, if he has no title to the seven pounds, then till release there is no right of action; and then they do not lie in demand till release; and that a release of

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Release of all demands will not release a thing which at the time of release is not demandable.

"all demands" will not release a thing that does not lie in demand at that time, *vide* 2. Cro. 171. 5. Co. 70. *Idoe's Case*. A release to bail in the king's bench before judgment against the principal is not good, because till then the cause of action is uncertain, and therefore not demandable.

So THE WHOLE QUESTION will be here, Whether the plaintiff could have an action before the release? And as to that it has been urged, that in this case there were mutual promises, and the one promise is the consideration of the other; and that then he that brings the action needs not aver any performance of his side; and this likewise would be a true and necessary consequence, if the promises were true. But where the one promise is the consideration of the other, and where the performance, and not the promise, is it, is to be gathered from the words and nature of the agreement, and depends entirely thereupon; for if in this case there were a positive promise that one should release his equity of redemption, and on the other side that the other would pay seven pounds, then the one might bring his action without any averment of performance; but this agreement is not so, but that the plaintiff should release his equity of redemption, in consideration whereof the defendant was to pay him seven pounds; so that the release is the consideration,

Where the promise is executory, it is a condition precedent.

and therefore being executory is a condition precedent, which must be averred. And whereas there seems to be a variance in the Books upon this learning, it will be fit on this occasion to settle it; and I agree the case in *Hob.* 58. to be good law; for there is a positive agreement that one shall deliver a cow to the other, and that the other shall give him so much money, and therefore the action lies

If one is to do a thing for which another thing is to be done, it is a condition precedent.

for either side, without performance of his promise; but if by the agreement *A.* were to deliver *B.* a cow, and that for it *B.* were to deliver him a horse, there the delivery of the cow would be a condition precedent, and therefore ought to be performed before *A.* can bring his action; and upon this diversity the Books are reconcilable. 15. Hen. 7. 10. pl. 17. If *A.* covenant with *B.* to serve him for a year, and *B.* covenant with *A.* to pay him ten pounds, there *A.* shall maintain an action for the ten pounds before any service; but if *B.* had covenanted to pay ten pounds for the said service, there *A.* could not maintain an action for the money before the service performed. And there is great reason for this diversity; for when one promises, agrees, or covenants, to do one thing for another, there is no reason he should be obliged to do it till that thing for which he promised to do it be done; and the word "for" is a condition precedent in such cases. But upon this head some diversities are to be observed.

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FIRST,

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FIRST, If there be a day set for the payment of money, or doing the thing which one promises, agrees, or covenants to do, for another thing, and that day happens to incur before the time the thing for which the promise, agreement, or covenant is made, is to be performed by the tenor of the agreement; there, though the words be, "that the party shall pay the money," or "do the thing for such a thing," or "in consideration of such a thing," after the day is past the other shall have an action for the money or other thing, although the thing for which the promise, agreement, or covenant was made be not performed; for it would be repugnant there to make it a condition precedent; and therefore they are in that case left to mutual remedies, on which, by the express words of the agreement, they have depended. *Vide* 48. *Edw. 3. 2, 3.* cited in *Ughtred's Case (a)*, where the diversity is taken when there are mutual remedies and not; it is thus put in that Book: *Sir Richard Pool* covenants with *Sir Ralph Tolcelfer* to serve him with three esquires in the wars of *France*; *Sir Ralph Tolcelfer* covenants, in consideration of those services, to pay him so much money; and there it is said, action will lie for the money without any services performed. But if you look into the Book at large, you will find it was upon the diversity which I have taken; for the case in 48. *Edw. 3. 2, 3.* is, *Richard Pool* covenants with *Ralph Tolcelfer* to serve him with three esquires in the wars of *France*, and *Ralph Tolcelfer* covenanted with him to pay him so much money for the service; and it was further agreed, that twenty marks of the money should be paid in *England*, at a day certain, before they went for *France*, and the rest by quarterly payments, which might likewise incur before the service; and upon action brought by *Sir Richard Pool* it was objected, that the service was not performed; but there was no room for that objection upon the diversity which I have taken, the money, by the agreement, being made payable at a day certain, before the service was to have been performed. 1. *Vent. 147.* Covenant, that in case *A.* would let *B.* enjoy land for a certain term of years, for the enjoyment he would pay him so much money before the expiration of the years. 3. *Leo. 156.* Covenant to pay so much money, the other making him a good estate in such lands: held the making the estate to be a condition precedent, and therefore to be averred. 1. *Saund. 319.* is upon the same diversity: An agreement was to let * a house to the plaintiff, with certain brewing vessels; the plaintiff covenants to pay so much money for it before *Midsummer-Day*; and here, because a day certain was appointed for the payment, though no assurance was made of the house, &c. yet an action lay for the money. If *A.* covenant to make an assurance of lands to *B.* who covenants to pay him ten pounds in consideration thereof, there he is not bound to pay the money before the assurance made; but if he had covenanted to pay the money in consideration of the cove-

Not if it be to be done at a time before which the other is to be done, it is not a condition precedent, but parties must have mutual remedies.

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(a) 7. Co. 10. b.

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nant to make the assurance, he would be liable to an action immediately (a).

Where it is a condition precedent, the doing it must be averred to maintain an action.

SECONDLY, If there be a day for the payment of the money, or doing of other act for another, and that day is to be after the performance of the thing for which the promise, &c. was made, there, if the agreement be to pay the money, or do other thing, "for" or "in consideration," or such other words that would make a condition precedent, there such things, for the doing or performing of which the other agrees to pay the money, or do other thing, must be averred to maintain an action; and for this *Sir W. Jones*, 318. The executor of *A.* brought an action on the case against *B.* declaring, that in consideration *A.* in his life-time did promise to assure certain lands to *B.* before *Michaelmas* next, *B.* promised to pay him so much money for the land; so the assurance was to be made before *Michaelmas*, and the money was to be paid for the land, and consequently after *Michaelmas*, for *A.* had time till *Michaelmas* to make the assurance; and because the assurance was to have been made first, and the money by agreement to be paid for the land, though there were mutual promises, yet it was adjudged the action would not lie for the money without making the assurance first. This case, as it is there reported, is intricate, and requires consideration to make this construction upon it; but upon examination it is a full authority in point. *Dy. 76. pl. 3.* *A.* agrees to deliver *B.* a hawk at *Midsummer*, for which he agrees to pay him a horse at *Michaelmas*; there if a hawk be not delivered at *Midsummer*, there shall be no horse delivered at *Michaelmas*, nor any remedy for it. *Ughtred's Case* has afforded a ground for a variety of opinions upon this question; but such as seem against these diversities laid down by me shall receive a full answer. And in 1. *Roll. Ab.* 414. are several cases which have been urged against me: the first is said to have been in *Michaelmas Term*, in the seventh year of *James the First*, and it was a charter partite between *A.* and *B.* by which *A.* covenants to go a voyage, and take in several ladinges at several * ports beyond the seas, and return with them home; *B.* covenants to pay *A.* for all that voyage one hundred and forty-seven pounds at a day, whether after or before the voyage is left in doubt by the Book; and there it was adjudged, there might have an action lain for the money without averment of performance of the voyage: and this seems an authority in point against me. But

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(a) The reasoning on this point of the case, together with the authorities 28. *Edw. 3. 2, 3. 7. Co. 10. b. 1 Vent. 147. and 1. Saunders, 319.* are recognized as law by Mr. Justice Buller, in the case of *Terry v. Duntze*, in the court of common pleas, Hilary Term, 35. *Geo. 3.* in which it was determined, that if *A.* covenant to build a house for *B.* and finish it on or before a certain day, in consideration of a sum of money which

B. covenants to pay *A.* by instalments, as the building shall proceed, the finishing the house is not a condition precedent to the paying the money, but that the covenants are independent; and therefore *A.* may maintain an action of debt against *B.* for the whole sum, though the building be not finished at the time appointed. *Terry and Another v. Duntze, Bart. 1. M. El. Rep. 389. to 393.*

first,

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first; it does not appear there but that the day of payment was before the voyage performed; but a full answer to it is, that there was a writ of error brought, and that judgment reversed for want of an averment. *Vide 3. Bulst. 147.* Rolle reports the judgment in the common pleas, in the seventh year of *James the First*, but it seems had not seen the reversal thereof, which was in the ninth year of *James the First*, two years after, as it is in *Bulstrode*, where it is adjudged, that "*pro totâ transfretatione*" is a condition precedent, and that its being in mutual covenants makes no alteration. Then there is 1. *Roll. Abr. 415.* said to be in *Michaelmas Term*, in the fifteenth year of *Charles the First*; and it seems also against me in point: There were articles of agreement made by *A.* in behalf of *B.* of the one part and *C.* of the other part, where it was covenanted by *A.* that *B.* for consideration hereafter expressed, should convey certain lands to *C.*; *C.* on his part, for the consideration aforesaid, covenanted to pay *B.* one hundred and sixty-six pounds; and it was adjudged, that the assuring the land was not a condition precedent. But this case does not come up to ours; for there is an express covenant, that (for consideration hereafter expressed) *B.* would convey to *C.* and *C.* (upon consideration aforesaid) covenants to pay the money; and that must be for as much as *A.* hath covenanted that *B.* should assure lands for consideration hereafter mentioned, that is, that *B.* hath covenanted to pay so much money; for it is, "*pro consideratione prædictâ*"; and the question is, What is meant by the words "*pro consideratione præd.*?" It is not said, "for consideration of conveyance of the land," but "*pro consideratione præd.*" which must be understood in consideration of the agreement that *B.* should convey, &c.; for the one covenants for consideration hereafter mentioned, which must be the covenant for payment of the money, and the other covenants for consideration aforesaid, which must be that *A.* covenanted that *B.* should convey. But I must needs say there is another home case; it was also in the time of *King Charles the First*, and it was on mutual promises to stand to an award between *A.* and *B.* and laid in consideration *A.* on his part did promise to stand to the award, *B.* on his part did promise to stand to it; and the award was made, that *A.* should pay *B.* ten pounds, in consideration whereof *B.* should enter into an obligation to release unto *A.* all actions; *A.* brings an action against *B.* for not entering into the obligation according to the award; and he did aver, that he had done all on his part, but that *B.* had not entered into the obligation; and the exception was taken, that there was no averment of the payment of the ten pounds, in consideration whereof he was to have entered into the bond; but it was said, there needed no averment; and this is full against me. But Rolle himself there says the Court were divided. And 1. *Cro. 384.* gives a quite contrary report of the case, and says, *JONES* and *HERKELY* held it a condition precedent, against *CROKE*; so I rather believe *CROKE*, who was one of the Judges, and tells you himself was of a contrary opinion. And as to *Haye's Case*, which is

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Vide 1. Vent. 41.

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arguing
THORP.

is also in 1. *Roll. Abr. ubi supra*, it is reported 1. *Cro.* 433. and it has no such point in it. These authorities therefore are well answered. There are some other scattered authorities in the Books of this kind. But let us now see the reason of the thing. What is the reason that mutual promises shall bear an action without performance? One's bargain is to be performed according as he makes it. If he make a bargain, and rely on the other's covenant or promise to have what he would have done to him, it is his own fault. If the agreement be, that *A.* shall have the horse of *B.* and *A.* agree that *B.* shall have his money, they may make it so; and then there needs no averment of performance to maintain an action on either side; but if it appear by the agreement that the plain intent of either party was to have the thing to be done to him performed, before his doing what he undertakes of his side, it must be then averred: as where a man agrees to give so much money for a horse, it is plain he meant to have the horse first, and therefore he says the money shall be given for the horse. And it would be very dangerous to make every cursory agreement of parties to amount to mutual promises to bear an action without averment of performance: and therefore if two meet, and the one has a horse to sell, and the other would buy one, and they agree on the price, and then part without any earnest, or reducing the matter solemnly into writing, there, though there be no words of condition precedent, such cursory agreement ought not to be admitted as evidence of a mutual agreement; and it ought not to pass for a contract, but rather for a bare communication. *Vide Dy.* 30. —, 24. *Style*, 32. But if there be a solemn transaction, as writing, * as that *A.* would deliver his horse to *B.* and no time appointed, and that *B.* should pay so much money to *A.* there, if there be not the word "*for*" or other words of condition precedent, a mutual action will lie, without averment of performance; but if it be only a discourse, without the solemnity of writing, earnest, &c. it ought not to be allowed. There is a case in 2. *Mod.* 33. In *assumpsit*, the plaintiff declared, that in consideration that he promised to assign to the defendant his interest in certain land, the defendant promised to pay him *proinde* so much money, and averred that he offered to assign the interest; but that matter being not well pleaded, the question was, whether it was necessary to aver performance; and held, on the reason of *Ughtred's case*, that it was not. And this will be a light to the reasons of *North v. Wild* there, *Vide Style*, 186. Covenants were between *A.* and *B.* that *A.* should bring 500 soldiers to such a place, by a day certain, to be transported; and that *B.* should attend there then with ships to transport them, and both parties failed; and the question was, Whether, though *A.* had brought no soldiers, *B.* had broke his covenant, in not being ready with ships? and held, that *B.* had broke his covenant, though *A.* had not brought the soldiers. But this differs from our case; for there are two distinct acts to be done, one is to be ready with the soldiers, and the other with ships; and the performance of the one does not depend upon the other; the

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the doing of the one is not the reward for the doing of the other; but they are distinct acts, and each party to do his part; there was also a day appointed. And this is not a hard case, for they are mutual acts not depending the one on the other. But in our case, the money was to be paid for the release; and a vast difference. And the seven pounds being not to be paid in consideration of making the release, the words "*in consideration*" make a condition precedent, which till performed does not entitle the plaintiff to action. Then the seven pounds were not demandable here, and consequently not dischargeable by the general release of all demands.

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ANOTHER OBJECTION was, That the plaintiff had not averred a release given, or tendered by him, as he ought to have done. But here sufficient appears that it was done; for he avers performance of all that was to be done on his side; and that general averment, though informal, and beside wants time and place, for which it had been bad on demurrer, is helped by the defendant's passing it over and pleading a release, whereby he admits the plaintiff had a * cause of action. And there are stronger cases than this in the Books, where pleading over has helped an insufficient declaration. 3. H. 6. 8. Debt upon indentures, in which there was a penalty, in which the defendant did bind himself, if he did not perform all the covenants in the said indentures; and regularly in such cases the way is, for the plaintiff to set forth the indentures, and to assign breach of one of the covenants in certain; and in debt for the penalty he said generally, that the defendant had broke all the covenants in that indenture, without shewing any one in certain; the defendant pleaded a collateral matter in bar; and adjudged the declaration had been bad on demurrer, but that the plea over cured it, though the breach was double and uncertain. 9. H. 6. 16, 19. And it was so adjudged in this court, in *Bernard v. Michel* (a). But a full authority is that of *Vivian v. Shipping* (b): though they agreed the money awarded was to be paid before the other was to enter into the obligation to the plaintiff; yet the plaintiff did not expressly aver payment, but generally, as here, that he had performed all on his side; and that was adjudged good after plea pleaded. So we all agree the judgment ought to be affirmed; for there was no money due to the plaintiff till release of the equity of redemption, and therefore none demandable till then, and consequently a release of all demands could not bar it (c).

In *assumpsit* on a promise that the plaintiff should release his equity of redemption, in consideration of which the defendant would pay him seven pounds, it is sufficient in assigning a breach to say, that the plaintiff had performed all on his part, without specially averring a release given. 3. Inst. 147. 1. Vent. 147. 1. Vent. 214.

Vide Yelv. 50.

NOTE: In this case COWPER offered this diversity in relation to mutual promises, that where the promise is of a valuable thing to the defendant, there such promise, without any performance, may be a good consideration; but where the promise is not of a thing valuable, but may be a consideration, because a trouble to the

(a) 1. Vent. 114. 126. 2. C. 2. Keb. 754. 766.

(b) Cro. Car. 384.

(c) The judgment therefore was affirmed. 3. C. 1. Ld. Ray. 667.

party

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TERT party promising; there such promise, without a performance, cannot be a consideration, because such promise cannot be a trouble.

But *per* HOLT, Chief Justice, No diversity at all; but the cases are the same upon the learning laid down above.

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Cafe 795.

Parket against Kett.

The deputy of the steward of a manor may by writing under his hand authorise a person to receive the surrender of a copyhold estate to the use of the will of the surrenderor, out of court; for although a deputy cannot make a deputy generally, he may authorise another to do any particular act within the limit of his power as deputy; for the steward might authorise another to take such a surrender, and it is essential to the character of a deputy that he should have as extensive a power as his principal.

S. C. 1. Ld. Ray. 658.
S. C. Comy. 84.
S. C. Salk. 95.
S. C. 3. Salk. 124.
S. C. Holt, 223.

IN ejectment of lands in the county of *Norfolk*, upon the demise of the defendant *Kett*, and "Not guilty" pleaded, a case was made by consent, and it was this:

The lands in question were formerly the copyhold inheritance of *C. Kett*, who by his will devised the same to * *Elizabeth* his wife for life, and after her decease to *Charles Kett* his son, and to the heirs of his body; and if he died under age without issue, the remainder to his own right heirs. *A.* by writing under the hand and seal of the lord of the manor, whereof the premises were parcel, was constituted steward of the said manor, to exercise the said office of steward by himself or sufficient deputy. *A.* made one *Osman Clarke* deputy-steward; who, by writing under his hand, made two other persons deputies to him, to the intent to receive a surrender from *C. Kett* the father, to the use of the said will, with power to them two, or either of them, to receive the said surrender; one of whom came to the said *C. Kett*, then sick in his bed, and received his surrender. *C. Kett* dies. At the next court of the manor this surrender was presented by THE HOMAGE, and received. *Elizabeth* the wife is admitted copyhold tenant, according to the will.

THE QUESTION was, Whether this surrender, received by one under authority of *Osman Clarke*, the deputy-steward, be a good surrender?

This had been argued several times at the Bar; and this Term,

PER TOTAM CURIAM, That as this case stands, the surrender was a good surrender, was unanimously resolved. And two questions were made:

FIRST, Whether the said persons appointed by *Osman Clarke*, the deputy-steward, had a good and sufficient authority to receive the surrender?

SECONDLY, In case the authority were defective, whether that defect be not by intent and construction of law, or other subsequent act of the defendant, cured and helped? And as to that matter,

HOLT, Chief Justice, who delivered the opinion of the Court, argued thus: I AM OF OPINION, the said persons, deriving an authority

authority by writing under the hand of the deputy-steward, were sufficiently empowered to receive this surrender. And I go upon this ground, that *Osman Clarke*, being deputy of the steward, is thereby invested with all the power, and may do all such acts as his principal could do; for the nature of deputation is to convey all the power of the principal, without any reservation or restriction; for as he cannot enlarge his deputy's power, by giving him a greater one than he has himself, so he cannot abridge it by reserving part to himself. And this is apparent by the case of *Norton v. Stire (a)*, where the high-sheriff constituted an under-sheriff, with a proviso that he should not serve any writ of execution above the value of twenty pounds, without leave of the high-sheriff; and the proviso is held void, and contrary to the deputation itself, and therefore to be rejected. The * case goes further, and says, 'That if the under-sheriff had covenanted or given a "bond, &c. to the high-sheriff, not to execute such a writ without acquainting him therewith, such covenant, bond, &c. were "void." This being so, the question will be, Whether the high-steward could empower one to receive a surrender out of court? And it was never doubted but he might: and it is the constant practice of the whole kingdom; for he that is so empowered acts indeed under the high-steward, but not as his deputy, but only to do one single act. And a deputy, as hath been said, having equal power with his principal, the high-steward here, by making a deputy, has given him all his power; and by consequence a power to appoint one for a special purpose to take a surrender out of court. And this is seen every day, for the high-sheriff, who need not make an under-sheriff if he will, may make his bailiffs and precepts to them: yet if he make an under-sheriff, of necessary consequence he gives him power to make bailiffs and precepts, without acquainting him therewith. And this he can do only by virtue of his deputation; and why shall not an under-steward, or deputy-steward have the like power? But a considerable objection is made; for in the case of under-sheriff, he acts all in the name of his principal; and the deputy-steward here took no notice of his principal. *Answer*. It is true, the deputy-sheriff must act in the name of his principal, because the writ is directed to the high-sheriff, and the under-sheriff acts under the authority and command of the writ, and therefore must act in the name of him to whom the writ is directed. But here the under-steward acts under his principal's authority at large. *Vide Camb's Case (b)*, by which it appears, that he that acts under another ought to act in his name, and that is good law without dispute; and I agree that here *Osman Clarke* might make use of his principal's name, and it had been well; but the question is, whether it be not well in his own name; and surely it is, upon the reason of that very case. It was a letter of attorney to make a surrender in

PARRIS
agent
KETT.

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Deputy sheriff
must act in the
name of his
principal.

If deputy stew-
ard acts in his
own name, it is
good.

(a) *Hob. 12.*

(b) 9. Co. 75.

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against
KETT.

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Where one has
authority, and
does an act
which cannot be
good but under
the authority, it
shall be taken
so be under it.

the name of a copyholder; and the attornies might in that case draw a surrender in the copyholder's name; but they do not do that, but recite their authority, and say, that they by virtue thereof make a surrender. And though it was they surrendered, yet it was not their surrender, but they did it by his authority; and it was substantial though not formal; for the entry in such case is, that *A.* by *B.* his attorney, came into court and surrendered, &c. yet being made as above, it is well enough, though generally and legally the act of an attorney is the act of his principal, and so is the act of a deputy. And therefore, here on record it is not said *A.* an attorney, in the name of *B.* his principal, did so and so; but that the principal by *A.* his attorney, &c. and so should the surrender in *Comb's Case* have been; but being by virtue of an authority from the principal, it was held well. But in *Comb's Case* the authority is recited, but that is not done in our case. If it had been said here, "by virtue of an authority which I have from *A.* the high-steward; I do appoint such and such to receive the surrender," it had been well, according to *Comb's Case*; but instead of that he takes upon himself, as principal, to give power to accept a surrender, and yet I hold it well enough. For when one has an authority, and does an act which can be good no other way but by virtue and in pursuance of that authority, it shall rather be understood to have been by force of his authority than void; though in doing the act he takes no notice of his authority: But where one has an interest and an authority together, and he does an act generally, it shall be construed in relation to his interest, and not to his authority: And this is the very point of *Clere's Case* (a): he was seised in fee of three acres of land *in capite*, of equal value; and made a feoffment in fee of two of them to the use of his wife for life, for her jointure; and of the third acre to the use of such person and persons, and of such estate and estates, as he should devise by his last will; and after by his will devises the said third acre, without any notice taken of his power reserved upon the feoffment: Now, if they had been three acres of land in socage, and he had made such a feoffment, and after devised the third acre, without reference to his power, it had passed by the will, because then it might either pass by virtue of his interest, by the will, or his authority by the feoffment; but being *capite* lands, which could not pass but by the authority, because he had passed two parts by act executed; this devise was construed to be an execution of his authority, because otherwise the devise had been to no purpose. So in the principal case, the deputation, or rather authority given by the deputy, shall be intended to be by virtue of his authority; for otherwise it would be utterly void: and that, though the deputy took no notice of his principal in his giving that power; and there is no diversity between those two cases. And a deputy steward

* may hold a court without taking notice of his principal's name, and it will be good either way; and if he can hold a court in his

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own name, as deputy-steward, why cannot he appoint another in his own name to act for him to a particular purpose, without taking notice of his principal? and therefore this seems a good execution of his authority as deputy, if there be no more in the case. But it is objected, that the person to whom the surrender is made, is by the writing named a deputy; and a deputy cannot make a deputy, nor can the power of deputy be more or less confined than that of his principal. And I agree there cannot be a deputy of a deputy, nor the power of a deputy abridged. But the word "deputy" in the instrument must be only construed to shew the deputy's intent to empower him only for this particular purpose; and besides there are general words in the instrument sufficient to give authority to accept a surrender 3. Co. 533. seems to me in point, though upon a penal law, inflicting a forfeiture of goods upon any that shall land them, without agreeing with the collector, his deputy or comptroller; and the collector made a deputy, who made another, with whom an agreement was made, which was after adjudged good, not as made with a deputy, but with a deputy's servant; *similiter hic*. And suppose there were a defect in this power, and it were not good to all purposes; yet, as this case stands, is not this person a good steward *de facto*, as they call it, as to this particular purpose, and this act as good as any act by a steward *de facto*? And I am of opinion it would be good so too; for it is agreed a steward *de facto* may take a surrender, and a steward *de facto* is in truth no steward at all, for he only acts as such, and so did this person; and he is in fact and law no steward, yet his act shall be judged sufficient in case of a formality, as here, only to receive a surrender, or be an instrument to pass the estate. Besides, there is colour of a legal authority; *Osman Clerke* is agreed to be a good deputy, and takes upon himself to appoint a deputy: suppose it is so, which he cannot do, no more than an under-sheriff can make an under-sheriff, or a bailiff make a bailiff; but still it gives a colour, and here is the appearance and form of a legal proceeding, and he is reputed to have an authority; and in such case, if surrender be taken and duly presented, it will be well, beyond dispute. *Moor*, 108. 110. goes very far in this case. Two joint stewards of a manor to execute the office jointly, but not severally; and one of them held a court, at which a copyholder was admitted; and it was adjudged well by the whole court of exchequer, and after that judgment affirmed in the exchequer chamber, as to this point, but reversed upon another point. And one alone had no more power in that case to act, without his companion, than if he had not been named at all; yet because there was a colour and show of a legal court, and a surrender made and presented, it was held good. And the words of that Book are very strong; for *MANWOOD*, who delivered the opinion of the Court, that the surrender was good, took two diversities. FIRST, Between surrenders and admittances or grants. If lord disseisor receives surrender, and makes admittance thereupon, it shall bind the parties and the disseisee; but if he make a voluntary admittance

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PARKER
against
KETT.

Acts of steward
de facto good.

2. Lev. 124.

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Where there is
a colour and
show of a legal
court, the acts
are good.

To a voluntary
grant of copy-
hold, must be
title to make it
or good.

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PARKER
against
KETT.

Payment of
debts by *tert* ex-
ecutor are good.

3. Cro. 565.

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Acts done by a
bishop *de facto*,
as institutions,
inductions, are
good.

1. Leo. 288.

or grant, the disseisee shall avoid it. Another diversity taken, is between one that has colour of right, and yet has no right; and one that has neither colour nor right. If one who has only such colour holds a court, and another surrenders to him, it is good; or if the suitors make their suit to him, they shall be discharged of that service. And he goes further, and shews what shall be sufficient to make a colourable steward; as where one holds his court without contradiction of the lord; or under-steward holds a court after the death of the high-steward; or if the lord's clerk holds the court; all these are colourable stewards; and I think this person here had as much authority to do what he did, as a deputy to hold court after the death of his principal, &c. And the reason of the law in other cases agrees with this; as AN EXECUTOR *de son tort*, who is but an executor *de facto*, if he do lawful acts with the goods, as paying of debts in their degrees, it shall alter the property against the lawful executor; as if he pay just and honest debts, the rightful executor shall not avoid that payment; and yet it is an act done by one that has no right: It is true he is not quit against the rightful executor, but he shall maintain trover against him; but what shall he recover in damage? Only for so much as he has misapplied, and all that he has well applied shall be abated in damages (a), And what is the reason of this? Why, because the meddling with the goods is that which gives the creditor notice who is executor, and bound to pay the debts; and the creditor is not bound to enquire into the executor's title; if there be a colour and appearance of it, it suffices. If executor *de son tort* get three hundred pounds of the testator's goods, and pay it duly to a just creditor, there the lawful executor, in my opinion, shall not even maintain trover against the wrongful executor, because it is a good payment, and no prejudice to the executor. So here, there is no prejudice to any, and it is only an act of formality. 2. Cro. 552. 1. Rol. 101. 130. Pal. 20. *The Bishop of Ossory's Case*; there was a void sentence of deprivation against him, and the see full of another who acted *de facto*; and there cannot be two bishops of a diocese, and the sentence of deprivation was set aside as void; yet it was resolved, that all institutions and inductions, &c. by the colourable bishop were good, as if done by a rightful one; and shall not the same reason hold here? Another case, stronger rather than this, is that of 1. Leon. 288. cited at the Bar; my *Lord Darcy's Case*, who being lord of a manor, made a steward, with power to make a deputy; and the steward, instead of making a deputy, sends his servant to hold the court, and in that court a surrender was made; and though it was said there, that a subsequent act of the lord's amounted to a confirmation, it could not avail as such, if there were no copyhold tenant before, and in by surrender and admittance. Vide 4. Co. 25. And if it works by way of confirmation, it must have wrought upon the estate granted by the surrender to the servant; and yet that surrender was not at any real court, nor

(a) See Anonymous, ante, 441. 2. Term Rep. 100. 3. Term Rep. 550.
could

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could the lord's subsequent agreement amount to a grant, and he is copyhold tenant no otherwise than by the surrender to the servant ; and surely if a servant may hold a court to take a surrender, he may take one out of court, and the lord's consent after could only make it undefeasible, but not give a being to his estate.

PARKER
against
KETT.

Lane against Sir Robert Cotton.

Case 796.

IN AN ACTION ON THE CASE the plaintiff declared, reciting the statute of 12. Car. 2. c. 35. by which one general post-office, and one general post-master are erected, for the sending of letters all over the three kingdoms, &c. and also the statute of Jac. 2. c. 1. and that Sir Robert Cotton was made post-master by letters patent of the fifth of May, in the third year of William and Mary, pursuant to the said act of 12. Car. 2. by which the said master has power to make deputy and deputies, and other officers and servants under them, as they shall think fit; that the * said master by these patents is to obey such rules and orders as shall be given him by the king under THE SIGN MANUAL; and as to the revenues of the office, the master is to observe the order and direction of the lords of the treasury; and in the said letters patent the king covenants, that he shall be only answerable for such miscarriage and neglect as shall be his own, and not for that of any other body; and for the executing of this office an annuity of fifteen hundred pounds a-year is granted him out of the profits of the office: That the plaintiff being possessed of eight exchequer-bills in London did inclose them in a letter, directed to one Jones, a goldsmith in Worcester, and delivered the said letter, with the bills so inclosed, to one B. then an officer under the defendant, duly elected to take in, and deliver out, letters at the office in London, to be sent according to the direction; that this B. received his salary by the hands of the receiver-general; and that the said letter, being so delivered to him, was taken out of the office at London, by an unknown hand, and lost.

The post-master general, not liable to an action for the recovery of exchequer-bills contained in a letter and delivered to a clerk at the post-office, and lost from the office (a).

* [473]
S. C. 5. Mod. 455.
S. C. Salk. 17.
143.
S. C. Comy. Rep. 100.
S. C. Carth. 487.
S. C. 11. Mod. 12.
S. C. Holt, 582.
S. C. 1. Ld. Ray. 646.

The question was, Whether an action lay against the post-master, or not?

IT WAS ARGUED for the plaintiff, the office of post-master was an antient common-law office, but exerciseable by any, and as many as would take it upon themselves; against whom any person had his remedy for any damage that happened through their default; this was the law before the said statute, whereby one general post-master is appointed, but not by way of creating a new office, but making one public office of all the prior private ones. And the end proposed by the parliament in so doing, as the act tells us, was a more speedy and safe conveyance of letters. So that this being an

(a) It has also been decided, that an action will not lie against the post-master the sorters out of a letter delivered into the Post-office, Whitfield v. Lord Despencer, Cowp. 754.

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LANE
against
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ancient common-law office, ought to be governed by the same law with other common law offices; and therefore the posts, whether private or public, are to be considered as common carriers of small packets; and consequently liable to make satisfaction for miscarriages, as other common carriers. And that the statute meant to make them liable, appears by its saying the office is made public for greater safety: And since before, the party that sent letters by a private post had the security of an action against him if he miscarried, of necessity that remedy still continues in like manner against the post-master general, or else the preamble of the statute were false. By the second section of the statute it is ordained, there should be one master, or general officer, who from time to time should have the sending of all letters and packets, &c. to * their several addresses; from whence I infer, First, That *all* letters are to be sent by him. Secondly, That he is an officer. By the eighth section, none but the master general, or his deputy, is to receive or carry letters by the sea or land, or hire horses or boats for that purpose; the act does not say that none shall carry letters but the master, or other officer put under him by the king; but, by *him* authorised. *Vide* l. 2. and 10. By the fifteenth section he is bound to find post-horses, under pain of five pounds for every failure; which shews that he is to answer for his under-officers; and in the letters patent, whereby the defendant is nominated, there is a covenant from the king, that the defendant shall not answer for the default of any but his own; which shews, he apprehended himself liable for those of his officers, and therefore provided against it by the covenant. And it is no reason to say, that the under-officers are the king's servants, and not his, because the king, and not he, pays them; for that is not so by the act of parliament, but only by a private agreement between the king and him; and such agreement cannot deprive the subject of a benefit which the law gives him. The sheriff, who by law is obliged to take upon him his office, is answerable for the miscarriages of his under officers; *a fortiori* in this case, where one is not compellable to take the office upon him; and it is for this reason that a grant of the office of a county clerk by the king is void. 4. Co. 32. Then there is a manifest neglect in the defendant; for by the statute, the master and his servants are to send letters and packets to their directions; and it is part of the case, that the letter in question was delivered to the person appointed to receive letters in the office, which is the same thing as if it were delivered to the defendant himself; and his duty was to send it, wherein he failed; for it is agreed it was taken by a stranger out of the office. Besides, the letter was given to be sent, and he received it so; and his receiving to send, was to send safely, according to *Southcoat's Case*, 4. Co. And it is upon this reason, that all tradesmen are obliged to do things carefully and skilfully; and if they fail therein, care will lie against them; for the very taking upon them to do it is a taking to do it carefully and well: And if it be so in every private person's case, *a fortiori* it will be so in the case of a public officer, whom one is compellable

lable to use. And upon this reason also it is, that * case lies against a sheriff for the escape suffered by his bailiff; much a harder case than the present. By the same reason the defendant, having taken upon himself this office, has also taken upon himself to do it carefully; but instead of that, the letter is taken away in the very office, where none could come without his leave. And if this be through the neglect of him, or his servants, he ought to answer for it; like the case of an inn-keeper, who shall answer for his servant's neglect. It is objected, the king has all the revenue of the office, and the master but a salary insufficient to answer casualties of this kind. *Answer.* It was his folly to take the office upon those terms. And this is a stronger case against them than that of *Ray*. 202 for here it does not appear that any trick was used to get the letter from them, or that they used convenient care. If the master be not liable to our action, we have an injury done us and no remedy for it: We have it not against the king, for he is only to nominate this officer; and the under-officers are only servants, and accountable to their master only. And then the consequence would be very dangerous both to the king and subject: for by the act none can send letters by any private post; and if one cannot send his letters but by one hand, and that he may with impunity embezzle all letters, farewell to all trade and commerce, one of whose chief supports is correspondence by letters; and what can be more fatal to the revenue than a decay of trade?

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IT WAS ARGUED *on the other side,*

FIRST, That *exchequer-bills* were not such things as the post-master was, by the duty of his office, obliged to take in.

SECONDLY, That by the act he is not bound to make satisfaction for every particular man's loss in the things within the extent of his office.

THIRDLY, That in this case he is not answerable.

THE FIRST depends on the construction of the statute, what it intends to be sent by post; and the statute intended a maintaining of correspondence at home and abroad; and that by carrying of letters, not goods or money, for that is not necessary for mutual correspondence. Indeed, whatever thing, by the intent of the statute, is within the office of the post-master, is not to be done by any other; but without doubt any other may carry money or goods, without offence against the statute; *ergo* such things are not within the extent of the post-master's office; and a carrier may carry a letter along with goods. Now *exchequer* * bills are of the same nature with money, and current as such; and by consequence may be sent with a letter by a carrier: *Ergo* not within the duty or extent of the post-master's office; and one may as well say the post-master is bound to send jewels. And it would be a hard construction that the master should carry *exchequer-bills*, for these reasons. FIRST, He must send his packets by day and night,

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for the speed required by the statute. SECONDLY, He must trust boys and indigent people, whose poverty will make them obnoxious to temptations; for none of substance or ability to give security will undergo such slavery. THIRDLY, It is impossible for him to send sufficient guard, from the smallness of the *premium*, the dispatch they must go with, and incertainty of wind and weather: therefore, from the nature of the thing, the parliament intended the office for such things as in their nature might be sent with speed and safety, which exchequer-bills, being current as money, are not. There is a clause in the statute which shews it intended not that things of value should be sent by the posts; for it says such things might be sent by messengers; and bills of exchange are the only things which may seem of value that it mentions might be sent by it: But the reason of that is, because, First, It was very convenient for trade. Secondly, There was no danger in it; for when this statute was made, bills of exchange were payable to a third person, or order, and if they were foreign bills, there were letters of advice; so there was no temptation of stealing them, and by consequence no danger.

SECONDLY, If we consider the smallness of the *premium*, we find it bears no proportion with the risque he would run if he were liable for miscarriages; which is a demonstration the parliament did not intend he should; for they do not proportion the *premium* according to the value of the thing sent, but according to the weight and distance of place. And there is a clause, that the price should not be enhanced upon account of bills of exchange; which plainly shews they did not intend he should answer for a miscarriage of them. The statute impowers him to appoint agents and deputies all over the world; and the argument used would make him liable for the miscarriages of them. And such construction would destroy the office itself. There is no comparison between the office of carrier and this: a carrier is not bound to travel but by day, and if he be robbed he has his remedy over. He himself may travel * with his waggon in person. If a thing of value be sent, he may make his own price, according to the risque he runs; whereas the post must travel by night, trust deputies, has no remedy over if he be robbed by night, and cannot insist upon a price, but what is cut out by the statute. This is not like the case of a master of a ship, who is answerable to the owners for damage done by the seamen to their goods; because, First, He is there in person, to see and correct what is amiss. Secondly, That is upon a particular contract between him and the owner, according to the maritime law; and he may choose whether he will go or not, if he does not like his reward; but in our case, one may send one thousand pounds worth of exchequer-bills, and the master know nothing of it. Nor is it like the case of a sheriff, who though liable to serve against his will, yet must answer for escapes of his officer. For, First, He is answerable only for the affairs of one county. Secondly, He may raise the *posse com.* to secure his prisoners.

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THIRDLY, This letter was taken out by an unknown person, and that must be understood to have been forcibly and against our will; and if so, we would not be answerable, no more than a factor would be to his principal for what he is robbed of.

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And TURTON, POWIS, and GOULD, *Justices*, were of opinion that the action did not lie against the master, because this was not like common-law offices, in which the superior answers for the inferiors as his servants; but this was an office newly created by act of parliament;

And, as GOULD, *Justice*, called it, founded in government, that is, in which each had a distinct branch to exercise; yet with subordination and dependancy on the chief master, but not as servants, but by the very constitution and erection of the office; and this by act of parliament, to which every one is consenting; and he said, every one of these, in his own peculiar station, was as much an officer *pro tempore* as the master; and compared it to a corporation, in which the head is over the rest, yet not answerable for the miscarriage of an inferior member. 1. *Edw. 5. 5.*

And TURTON, *Justice*, and HE agreed, that exchequer bills were not things proper to be sent by post; and they also all agreed the reasons before offered for the defendant.

But POWIS, *Justice*, held, there were sufficient words in the act to comprehend exchequer-bills.

HOLT, *Chief Justice, cont.* argued thus: Notwithstanding what has been said at the Bar by MR. ATTORNEY, (since Chief Justice of the Common Pleas), *my brother WRIGHT (since Lord Keeper), and COWPER, *King's Counsel*, and by my three Brothers on the Bench, I am of opinion that the plaintiff ought to have judgment.

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THIS CASE is comprehended in a narrow compass. Before I give my reasons, it will be proper to observe upon what points I go and insist on. And for that it is to be considered, that it is no part of the question here, whether if a letter be put into the post, and sent safely out, and THE MAIL on the road is robbed, or some other mischance happen whereby the letter is lost; whether, I say, the post-master be liable in that case is not the question now, for that is merely foreign, and deserves a separate consideration. But as this case stands now before us, where a letter is delivered to the proper officer in his office in London, and there lost in the very office, though no diversity has been taken between these two cases, either at Bar or the Bench, yet I think them different. There is reason the master should answer for the miscarriage of any letter or packet that is lost in the office, though not actually delivered to him, but to his servant; because by the constitution of the office he is entrusted with the profit and interest of the subject; and a trust is reposed in him, for the discharge of which he has a certain duty or salary. He is made a public officer by act of parliament, "That there shall be one general post-master."

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master." And it is plain the statute designed this for the benefit of the subject, as appears by the preamble thereof; and this was a matter of general concern for trade and commerce, and to the end that speed and safe dispatch should be had of letters and packets which, in the judgment of the parliament, was more likely to be had, by making one general office and officer; so it appears to have been done for the more benefit and safety of the subject. Secondly, This office is fixed at *London*, which is the center of business, from which all letters are sent, and all letters are to come, so there is a certain place settled where this office is to be. Thirdly, It is an office of care, and that care is committed to the post-master, that none but he, his deputy or servant, &c. is to take, receive, or send any letter, except such as may be sent by the carrier, coach, &c. as the act directs. So there is one man set up, and all the rest to be his deputies or servants; so that, from the nature of the trust, he is bound to keep safely in his office all letters and packets delivered in there at his peril, because it is a trust reposed in him by act of parliament, that is by law. This office is not at all distinguishable from that of marshal of this court, or of warden of the *Fleet*, who are entrusted with such offices by common law; and it is no excuse for them to say that their prisons were opened by unknown persons, though it be by people in open rebellion, as in the case of 23. *Hen. 6.* 1. the case of the *Duke of Norfolk*; and the reason is, because it is a trust by law in a public officer, and it being done under a government in which it is supposed he may have a remedy over, at least such remedy as the law allows, though the wrong was by persons in open rebellion; and there it was held, that debt lay against the gaoler for such an escape upon the statute of 2. *Rich. 2.* This was the case at common law, where a *capias* only lay for damages in trespass, but not for any action of debt, till 25. *Edw. 3.* c. 17. 3. *Co. 12.* And upon this subsequent act, which gives *capias* in debt upon a judgment in it, if the sheriff suffer one in execution on such *capias* to escape, debt will lie against him for it; though at common law, which made sheriff liable for escape, where *capias* then lay, no such process as a *capias* on a judgment in debt was known: and he is as much bound to keep those that are in for debt since that statute, as those who were in for damages in trespass before; and so is the law upon a *levari facias*. By the statute of *Westminster the Second*, c. 18. an *elegit* is given; and if sheriff take goods upon an *elegit*, he shall be liable to answer for them, if they are rescued, as if they had been taken upon the common-law process of *levari facias*. Upon the statute of 13. *Edw. 3. de Mercatoribus*, the sheriff is liable for goods which he takes in execution by *extendi facias*, by consequence of law merely, for such a thing was not before that statute. Then what difference can be made between the marshal of this court and warden of the *Fleet*, and this officer? for the master is to keep the letters safe till he sends them out,

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out, as the gaoler is to keep his prisoners till they are legally discharged out of his custody.

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Another reason why the master should be liable here is, because the subjects pay a reward for keeping and sending away their letters, and this reward is paid to one who makes it his business and employment to take and send letters and packets delivered to him; and wherever a man takes upon himself the exercise of an office, the exercise whereof is for the benefit and advantage of the public, and takes a reward for the same, he shall be answerable at law for any * harm the subjects receive by his ill administration of that office or employment, and for all events and chances, even from thieves and like malefactors, 2. *Cro.* 188. If goods be left with an innkeeper by one who is no guest or traveller, and they are lost, he shall not answer for them, because he has no benefit for the keeping, and it is not his employment to keep such; but if a horse be left in his stable, and he is lost, he shall answer for it, because he receives profit thereby, arising from the meat consumed by the horse. And *Hob.* 80. in the action against the hoyman, which is the first of the kind to be met with in Books, is upon that reason, because he had a hire for it.

Where a man takes upon himself an office for the benefit of the public, he is liable for it.

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Innkeeper liable for goods of a guest only.

My Brother GOULD says, This is an office founded in government: if he means that it is an office created and framed by law, he ought to make a quite contrary conclusion; for so is the office of a marshal, and yet he shall answer for escapes: and should not it be so too in case of an officer created by act of parliament? for the one and the other are by law, the one and the other for the benefit of the subject; in the one case, the prisoners to be kept for their benefit to have their debts paid; in the other, that their letters be safely kept and sent away with speed; and why then should the officer in one case be answerable to the subject for his neglect or default, and not in the other? And since then he is entrusted with this office for the benefit and advantage of the subject, whatever consequential damage befalls the subject through his neglect, he ought to answer for it.

Another reason of Brother GOULD against the action was, That if it did lie, it must be upon a contract express or implied; and truly I do not think that, but that he is chargeable by the law and the nature of his office.

ANOTHER OBJECTION was, That the reward does not go to the defendant. Whoever gives a reward to have a thing done for him, ought to have a remedy if the thing be not done; and when a reward is given to an officer of public trust, that intitles the party to a remedy if he be grieved through neglect, or other default of such officer: and if he ought to have such remedy, surely it must be against him who received his reward. And is fifteen hundred pounds a-year so small a *premium* as not to encourage those that enjoy it to be more diligent in the execution of their office, so at least as to suffer no neglect within the
very

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very walls of the office, as it was here? And though all the salary or revenue of the office goes not to the defendant, yet his salary is to be paid out of the revenue of the office *. And there is no diversity between this case and the case of *Moffe* and *Slew* (a), which was thus: Goods to be transported to foreign parts were shipped in the River *Thames*; and there were a competent number of men on board for sailing the ship, but they were in the river overpowered and robbed; and the question was, Whether an action would lie against the master of the ship? And at a trial at Bar the special matter was found, and in arrest of judgment this very exception was taken to excuse the master, that he did not receive the hire, but the owners did, and the master had only a salary from them. But it was resolved against him, FIRST, Because he was a public officer: SECONDLY, Because his salary was part of the hire, and did arise for the care and diligence that ought to be taken for the safe custody of the goods. And so here the post-master is a public officer, and he has a salary from the profits of the office. My Brothers have taken a difference between the two cases; for that in the case of the master of a ship he might have taken precaution, which post-master cannot use. But what caution could there be used in one case and not in the other? It is true, it is said in that case, that if the owners of the goods had brought them before such time as was convenient before the ship was ready to sail, he might refuse to receive them; and that may be: and it is so in the case of a carrier; if goods be brought to his inn before the convenient time for him to be gone, he may refuse to take them; but in both cases, if one whom they entrust to receive goods before such convenient time receive goods, and they be lost, the carrier shall answer for them, and so shall the master. But no man shall by law justify to deny the duty of his office, for there is a perpetual obligation upon them to keep the things to them committed, till they have discharged their trust; and when they have done, and no sooner, are they discharged. This case is within the same reason of justice and equity of law upon which all actions of this nature are brought; and it has all the ingredients whereby one is made responsible in like cases for negligent keeping of goods; for what is the reason that a carrier or innkeeper is bound to keep such goods as he receives at his peril? It is grounded upon great equity and justice; for if they were not chargeable for loss of goods, without assigning any particular * default in them, they having such opportunity as they have by the trust reposed in them to cheat all people, they would be so apt to play the rogue and cheat people, without almost a possibility of redress, by reason of the difficulty of proving a default particularly in them, that the inconveniency would be very great. And though one

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(a) In the King's Bench in Hilary Term, 24. Car. 2. but entered Mich. Term, 23. Car. 2. Roll 421. Reported 3. Keb. 72. 112. 135. 1. Vent. 190. 238. Raym. 220. 1. Mod. 85. 2. Lev. 69. 2. Keb. 866.

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may think it a hard case that a poor carrier who is robbed on the road, without any manner of default in him, should be answerable for all the goods he takes; yet the inconveniency would be far more intolerable if it were not so, for it would be in his power to combine with robbers, or to pretend a robbery or some other accident, without a possibility of remedy to the party; and the law will not expose him to so great a temptation, but he must be honest at his peril. And this is the reason of the civil law in this case, which though I am loth to quote, yet inasmuch as the laws of all nations are doubtless raised out of the ruins of the civil law, as all governments are sprung out of the ruins of the Roman empire, it must be owned that the principles of our law are borrowed from the civil law, therefore grounded upon the same reason in many things (a). And all this may be, though the common law be time out of mind. And it is to be doubted that there was intelligence given here, that there were chequer-bills in this letter, otherwise it is improbable this letter should be singled out from all the rest. I do not here arraign the integrity of the gentlemen that manage the office, but we must here consider the whole mass of mankind; and though these are worthy persons, yet bad may succeed them, who may search and open men's letters, and none be the wiser, or able to fix it upon them; being transacted in their own office, and lying only in the offender's privacy, who thus may with impunity abuse the trust reposed in him. And a common carrier, or innkeeper, or master of a ship, must have answered. And in the case of *Moffe v. Slew*, it appeared the defendant was guilty of no particular default, for a power came upon him and robbed him; but surely more care might have been taken in this case, for if *Breeze* had done his duty, the bill could not have been taken out of the letter in the office. And the diversity between the case of a common carrier and this, upon account of the carrier's having a remedy against the hundred if he be robbed, it is none at all in the reason of the thing; for before that remedy was given, which was only by the statute of *Winchester*, the action did lie against him; and yet he had no remedy but against the robbers, if he could catch them, and the master has the like remedy here: and even now they are without remedy in some cases upon the statute of Stannaries, other than against the thief or wrong-doer. As to the case of an innkeeper, this diversity is offered between it and this; for that it is within his house, which is his castle, and he may make his servants watch all night; but surely they do not consider that these bills were lost within the walls of the office in *Lombard street*, which is likewise the defendant's castle, and that he may keep his servants up all night if he pleases: and the care in keeping up his servants to watch, if notwithstanding that a misfortune should happen, ought rather to discharge than to charge him; and therefore no more reason the one should be bound than the other. The case of the

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a. Bl. Com. 451.

Action lay
against carriers,
before the law
gave him remedy
against the
hundred.

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Co. Lit. 89.
1. Term. Rep.

(a) See Justinian's Institutes, book 4. title *De Legi*, 5.

innkeeper

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COTTON.

Difference be-
tween letter lost
in the post
office and on
the road.

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innkeeper is much a stronger case, for he is bound to receive all manner of people into his house till it be full, but the post-master need let none into his office but such as he pleases. As to the case of *Herbert v. Page (a)*, an action brought against him for suffering a rasure to be made in a record in his custody, and it was thought *prima facie* the action lay; but on better consideration, inasmuch as it appeared that he had not the sole custody of them, but that strangers of right had access to them without his permission, the plaintiff was barred: but here the post-master had the sole custody, and nobody had liberty to come into the office without his leave. I am apprehensive here some may think I would carry this point farther than I have already declared, by comparing it to the Carrier's case; and that by the same reason an action would lie if the letter had been lost upon the road. But I do not mean any such thing, for I would not give any opinion either the one way nor the other in that case, for it is a thing that probably may come in question hereafter: but let that be as it will, there is a difference between that case and the present, for the carrier receives the goods to carry safely, and the post-master the letter to send safely, and those are the words of the act; and I wonder no diversity has been taken between the case of a letter lost in the office and lost on the road, being sent safe out of the office, for there seems to be a great deal of difference; and it may be a question, upon the * words of the statute, whether when the master sends the letter safely away he be not discharged? Suppose then he was not chargeable in case of a robbery on the road, it will not follow from thence that he is not bound to keep a letter safe in the office. And in the case of *Moffe v. Slew*, if the ship had been robbed at sea, the master had not been answerable, yet he was chargeable at land; so here, though he may not be chargeable for a robbery on the road, he may for a loss in the office. If a man bring a horse to an inn, and desire the master to put him into a stable till it cools, and then send him to graze; if the horse be stole before he sends him to graze, he shall answer for him; though if he had sent him to graze pursuant to the owner's desire, he would not be answerable; and so he shall be chargeable till he has performed the trust reposed in him, and as soon as he has performed it he shall be discharged. So here perhaps, if the letter had been sent away safe out of the office, he had performed his trust, and had been discharged; yet it will lie as the case is, where he has not performed his trust by safely sending it out.

Then by the duty of his office he is to take chequer-bills, though this has been denied by MR. ATTORNEY and my two Brothers; but it is his duty to receive them for these reasons: FIRST, By the words of the act he is to receive any "letter, packet, or thing proper to be sent by post." SECONDLY, This is a thing proper to be sent by post. As to THE FIRST, Where-

(a) Sid.

ever

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ever any subject takes upon himself a public trust for the benefit of the rest of his fellow-subjects, he is *eo ipso* bound to serve the subject in all the things that are within the reach and comprehension of such an office, under pain of an action against him; and for that see *Kelway* 50. If on the road a shoe fall off my horse, and I come to a smith to have one put on, and the smith refuse to do it, an action will lie against him, because he has made profession of a trade which is for the public good, and has thereby exposed and vested an interest of himself in all the king's subjects that will employ him in the way of his trade (a). If an innkeeper refuse to entertain a guest where his house is not full, an action will lie against him (b), and so against a carrier, if his horses be not loaded, and he refuse to take a packet proper to be sent by a carrier; and I have known such actions maintained, though the cases are not reported. And why should not an action lie against a post-master here, if he should refuse to take in a letter, or * any other thing proper to be sent by post? and doubtless an action would lie in that case. If the inn be full, or the carrier's horses laden, the action would not lie for such refusal; but one that has made profession of a public employment, is bound to the utmost extent of that employment to serve the public. Surely then where it is a public employment created by law, the obligation is the greater; as if the sheriff refuse a writ, an action will lie against him, because the law charges him with an employment for the conveniency and good of the public; so here the law, viz. an act of parliament, charges the post-master with an employment for the good and convenience of the public; therefore the reason is the same. As to THE SECOND, These chequer-bills are proper to be sent by the post, for the act does not confine what things are to be sent, but leaves it very general; it does not mention any species, but any letter or packet whatsoever; then it is plain the act meant other things than letters or packets of letters should be sent, for the prices are different, for there is so much a sheet for letters, and so much an ounce for other things, as packets of writs, deeds, or other things; which words are as general as may be: so the prices are varied from that for letters, and any thing whatsoever that may be sent by post. And all things, which by their nature may be sent with dispatch, and without danger of hurting the horses, are proper to be sent by post, of what nature soever they be; and nothing can be more portable than chequer-bills, for a small packet of them may contain to the value of ten thousand pounds.

IT IS OBJECTED, That they ought not to be sent by post, because they are new things, created long after the act for erecting the post-office.

I ANSWER, They are within the reason of other things which were *in esse*, and within the act when it was made, 4. Co. 4. a. b.

(a) Keilwood, 50. pl. 4.

(b) Dyer, 158. G. db. 346. Moor

432. 1. Vent. 333. 3. Bl. Com. 165, 166.

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If smith refuse
to shoe a horse,
action lies.

If carrier refuse
to take goods,
the horses not
being loaded,
action lies.

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If sheriff refuse
a writ, action
lies.

No

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No agreement made before or after marriage barred a woman of her dower, though she accepted what was agreed on after the death of the husband; but the statute of 27. Hen. 8. c. 10. makes estates for life of the wife, to take immediately after the death of her husband, to be a bar of dower, if it be made in satisfaction of her dower. And at the time of making that act, no land of freehold or inheritance was devisable but by special custom; and after by the statute of 32. Hen. 8. they are made devisable. If such husband, whose wife is entitled to dower, devise land to her in satisfaction of dower, and she accept of it after his death, though it be a thing not known or *in esse* at the time of making the statute of 27. Hen. 8. that makes a jointure a bar of dower; yet being within the same reason with other jointures mentioned in that statute, it is judged to be a jointure within it. And by the same reason, if chequer-bills be as proper to be sent by post as other things that were in being at the making of the statute of 12. Car. 2. though chequer-bills were not then known, yet they shall be within the same reason, and the post as much bound to take and send them as any other thing whatsoever. Another instance of the like is in the same case in 4. Co. by the statute of Marlbridge, made the 52. Hen. 3. A man seized in fee, infeoffing his son and heir to defraud the lord of his wardship, the feoffment is made void, as to the lord. And by 1. Rich. 3. c. *cestuy que use* has power to make a feoffment of the land out of which the use arises; by 4. Hen. 4. c. the heir of *cestuy que use* shall be in ward; and if, since that statute, *cestuy que use* make a feoffment by virtue of 1. Rich. 3. c. to his son and heir, it shall be void by the statute of Marlbridge, made two hundred years before; and it will be as good an argument to say, that if one come by the chequer-bill of another unlawfully, that trover will not lie for it, for that they are new things; as that they shall not be sent by post, because they are new things. But when an act of parliament creates a new interest, it shall be governed by the same law that like interests have been governed before.

Where an act of parliament creates a new interest, it shall be governed by the like law such interests were governed before.

IT HAS BEEN OBJECTED at the Bar, That the post-master is not bound to answer, FIRST, For bills of exchange payable "to bearer;" because it was the party's folly to make them so payable. SECONDLY, He is not liable for the loss of them, though made payable the ordinary way, viz. "to such a man or order," because he is to have nothing for them as such, no hire or postage. As to THE FIRST, A bill of exchange payable to bearer is lawful; and it is prudence in any man that has a mind to negotiate a bill of exchange, to get it drawn in that form, for then it needs no indorsement, and by consequence, if he does negotiate it, shall not be chargeable; whereas, if it were made payable to one or order, for every negotiation there must be a new indorsement, and every indorser is become liable *in infinitum*. And all bills, without exception, are to be sent by post, and this sort of bills, being lawful, may therefore be sent.

But

* But they pay no reward for sending or carrying them; therefore the post-master ought not to answer for a miscarriage of them.

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Answer. Whoever writes or sends a letter with a bill of exchange in it, it shall be intended that the letter was writ and sent for the sake of the bill, and therefore though the post do not receive an immediate direct reward for the bill, yet it receives a mediate consequential one; as in the case of an innkeeper, a passenger pays nothing for the keeping of his goods in the inn, but pays only for his victuals and lodgings, and the reward which he pays for his victuals and lodgings intitles him to an action for the loss of his goods. Besides, chequer-bills are not exempt from paying; and without doubt if a man sends a great packet or bundle of them, he is bound to pay according to the bulk of his packet. But suppose nothing were due for chequer-bills, no more than to a sheriff for executing a writ of execution; yet if the goods so taken in execution be lost, he shall answer for them, he being a public officer for that purpose. And there never was an instance, that an officer intrusted by law with the goods of a subject, but that, if he lose them, the officer by consequence of law was liable for them. And *Southcot's Case (a)* is very strong, though, by the by, that case, as reported there, is not all law; but where there is a special undertaking to keep the goods. For if there be but a general bailment, and a general acceptance, and so the matter left to a construction of law thereupon, how the goods shall be kept; the law will make construction, you should keep them as you do your own: but where there is a special acceptance to keep them safely, there, at your peril, you are bound by your special acceptance to keep them safe, though you have no reward, and that you are not compellable by law to take them; which is stronger than our case (b). But when goods are given to an officer of law, surely there it must be intended that they are to be safely kept; and therefore he shall be charged. And I do not think there can be a case put, where a public officer, or his deputy, was ever discharged in case against him for a miscarriage in them for goods, or other things, lost through their neglect.

Another reason to charge the defendant is, because before the statute of 12. Car. 2. the subject had liberty to send his packet by any other post-master he pleased, of which there were many in those days; it being then lawful * for any man to set up such an office. And if such, as had set up such an office then, had been robbed, the subject would have had his action, and recover against them, as much as against a common carrier; and this is admitted by the other side. So it is very reasonable, that those that take it now should take it upon the same terms it then stood; and the office

(a) 4. Co. 83.

reported in *Cro. Eliz.* 316.—NOTE in former edition.

(b) AND NOTE, This case is better

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is not new, but only, that instead of being exercised by many before, it is now exercised only by one; and all persons by this act are forbid to use any other post, or to send by any but by this one that is to be by letters patent under the great seal. And the post-master was, as I said, chargeable at common law before, and the employment is now the same that it was then, only that of being exercised by one person; therefore every thing that was incident to it then remains so still. And since the subject is deprived of his election of trusting whom he pleased with his letter, surely to compel him to send by one against whom he should have no remedy, would be the most unreasonable thing in the world, and the most unjust construction upon the statute.

A servant not
chargeable for
neglect, only for
misfeasance.

It was objected at the Bar, That they have this remedy against *Breefe*. I agree, if they could prove that he took out the bills, they might sue him for it; so they might any body else on whom they could fix that fact; but for a neglect in him they can have no remedy against him; for they must consider him only as a servant; and then his neglect is only chargeable on his master, or principal; for a servant or deputy, *quatenus* such, cannot be charged for neglect, but the principal only shall be charged for it (a); but for a misfeasance an action will lie against a servant or deputy, but not *quatenus* a deputy or servant, but as a wrong-doer. As if a bailiff, who has a warrant from the sheriff to execute a writ, suffer his prisoner by neglect to escape, the sheriff shall be charged for it, and not the bailiff; but if the bailiff turn the prisoner loose, the action may be brought against the bailiff himself, for then he is a kind of wrong-doer, or rescuer; and it will lie against any other that will rescue in like manner; and for this diversity, *vide* 1. *Leon.* 146. 3. *Cro.* 175. 143. 41. *Ed.* 3. 12. 1. *Ro.* 78. which is not well reported, but the inference may be well made from it.

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And here the defendant hath the power in him to manage the office by himself, his deputy or servant; and every deputy or servant is by him that puts him in, and therefore he ought to answer for him; and the reason why a * principal shall answer for his deputy is, because as he, as principal, has power to put him in, so he has power to put him out, without shewing any cause; and that, though he had expressly given him an estate for life in the deputation. *Vide Hob.* 13. *Mo.* 856. 39. *H.* 6. 34. And a deputy or servant may bring a greater mischief than this comes to upon his principal; for if one has an office of inheritance, in its nature forfeitable for such and such offences, or misdemeanors, and he puts in a deputy who commits such acts as would be a forfeiture in the principal if he had done them, he shall forfeit the office for his principal. 39. *H.* 6. 34.

(a) See the case of *Stone v. Cartwright*, that no action lies against a steward, manager, or agent, for damage done by the negligence of those employed by

him in the service of his principal; but the principal, or those actually employed, are only liable. 6. *Term Rep.* 411.

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The case in *Dy. 238.* to my great wonder has been quoted by my *Brother GOULD* as an authority, for him, for it is directly against him; by the 3. *Hen. 6. c. 3.* any customer that shall conceal any of the king's customs due for merchandize, shall forfeit treble the value of the merchandize; and by the statute of 1. *Eliz. c. 11.* the customer of any port may make a deputy for the customs of any creek belonging to that port; and a deputy so appointed had concealed the custom, and the principal, ignorant of this fraud, certifies his account into the exchequer, without taking notice of this fraud, or the custom due for the concealment; and an action brought against the principal, and adjudged it lay; and what is the reason thereof, but because the principal shall answer for his deputy? And where it is said, that the deputies of the post-master by the act have power to make deputies, and they are to have servants, who are to act under them, that makes no matter, for the principal shall answer for all the neglects, not only of the deputies he makes, but also of that deputy's deputy and servants; and so down; for he shall be answerable for every act of them, that shall tend to the prejudice of another in their deputation. But that is not this case; for *Bresfe*, in this case, through whole neglect this letter has been lost, was immediately put in by the defendant himself; though if it were by his deputy or servant, it had been the same.

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My *Brother POWIS* says, they are all fellow-servants; that is, the post-master and letter-carrier, because they all receive their salaries from the king, though retained and put in by the defendant; and compares them to a steward and servants of a nobleman's house. But I answer, that they are paid by the king as deputies and servants of the defendant; and there is no diversity but in the manner of paying * them, for they are under the command of the defendant, and to act according as he directs; and it was intended by the act, that he should pay all his servants out of his salary; and if he agree with the king to have so much clear for himself, and that the king shall pay his servants, they are no less his servants because the king pays them; and if they be not his servants, what becomes of the defendant, who is by the act to manage the office by him and his deputy, and servants? and if he let people manage it who are not his servants, and over whom he has no power, and they imbezil goods or other things, surely the defendant shall answer for it, for he does not manage the office as the statute directs; and his letting people in that are mere strangers, that ought not to be there at all, shall not excuse him from neglect or other mischance.

* [490]

But now my *Brother* has found out a better employment for him, and compares him to a captain, and his deputies and servants to the soldiers of a company, and as the captain shall not answer for the valour and courage of his soldiers, so neither shall he for the care and diligence of his servants. I AM OF OPINION, that

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if any particular person suffer a particular prejudice by the want of courage of a soldier, whom the captain takes in by his own election, he shall have an action against the captain for it; but that is not the case: for where a trust is put in one person, and another, whose interest is intrusted to him, is damaged by the neglect of such as that person employs in the discharge of that trust, he shall answer for it to the party damaged. And the case of a master of a ship is much more like that of a captain than the present; and yet he shall answer for the neglect of his seamen, and it is not his captainship will save him; and he shall answer for a robbery committed on him on land, and for neglect of his men at sea; though he shall not be answerable for a robbery on the sea.

* [491]

And it seems plain to me the act intended he should be answerable for all the letters and packets they should receive, and for the default of their servants. For first, it has given the whole power and government of the office to the master-general; and as this care is delivered to him, so nobody is to intermeddle but he, and such as he shall intrust; and if this act were said to create this office as a new office, notwithstanding the action would lie; for when an act erects a new office for the benefit of the subject, under the same circumstances with other offices, in which the * subject has an interest, in respect whereof the person exercising them would be liable to an action for the default of his servant, it must be presumed the act designed the new officer should be liable; for why else should they make it so like in reason? And in this case he is intrusted with the interest of the subject as much as the sheriff, or other officer of justice is; and the act directs the letters should be sent with safe dispatch; and who is to do that but the post-master?

Further it appears, that it was the design of the statute, that he should be answerable for the default of his deputy; and for that consider these two clauses. FIRST, "That the post-master and his deputies, and no other, should find horses; and if through default of post-master, any person shall fail of getting horses, in all such cases the master shall forfeit five pounds." Consider the words, "and if through default of *the master*," not of his deputy; which shews they intended, that if any fault be, that it shall be reckoned that of the master. For if one that rides post cannot be furnished with horses, who shall forfeit the five pounds for every default? The master, and not the deputy; and then surely the default of the deputy is the default of the master; and this appears plainly by this branch of the act.

It is objected, that this will ruin the office. But I think the contrary; and that it will be the means to have the office well kept; and will make them more careful to do their duty, and to discharge the trust reposed in them. But it is objected, that one may choose whether he will send his letter by post or not, for he may send a messenger of his own; and that is true; yet it is no
excuse

excuse for the defendant; for if there be several inns on the road, and yet if I go into one when I might go into another, and am robbed, or otherwise lose my goods there, the election I had of using that, or any other inn, shall not excuse the inn-keeper. So here, the plaintiff had election to send by the post or messenger; and if he send by post, and that there is default in him, he shall have his action. And he cannot send by the messenger with speed, as by the post; and speed was one of the benefits designed by the statute to the subject; and it took away the advantage he had of sending by a speedy messenger before, and so would put him in a worse condition, which never was the intent of the act; and as to the smallness of the *premium*, there is nothing in that, for the law thinks it a reasonable reward; and if one do not like the conditions of an office, he may let it alone.

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* Then as to the clause in the patent, that the defendant should not be answerable for any neglect, but his own immediate neglect; it must be intended only in relation to the management of the revenue, for which they are to account to the lord treasurer, or to be against law; for it is not a grant by letters patent, that shall deprive the subject of the benefit given by the act; for the post-master is to act according to the statute, and not according to the letters patent. And where it is said, that they shall from time to time observe such directions as are sent to him under THE SIGN MANUAL; if any ill consequence happen by such an observation, they are not excused; I say then, that this clause, that they shall not answer for miscarriage of servants, or any but their own, may have this effect, to exempt them from any mismanagement of the revenue of the office; because that being the king's, he may order that as he pleases. But that clause in a patent shall never deprive the subject of his benefit ordained for him by the statute, though it were with a *non obstante*, when *non obstante's* were in their utmost vigour.

* [492]

So for these five reasons I hold the action lies:

FIRST, Because it is a public office, intrusted to them by parliament, for the profit and benefit of the subject, which in its nature requires care and diligence.

SECONDLY, Because the defendant has a reward for his care at the expence of the subject.

THIRDLY, The same reason holds to charge them in this case as to charge carriers, inn-keepers, and such like, *videlicet*, the great inconvenience which would otherwise ensue, by reason of the dangerous temptation and opportunity they would lie under to imbezil goods intrusted to them, without possibility of proving a particular neglect.

FOURTHLY, They are within the meaning of 12. Car. 2. liable; and if that were not so, in this case defendant would be liable by his acceptance.

K k 2

FIFTHLY,

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FIFTHLY, They might send these things by other messengers before the statute, against whom an action would lie for miscarriage, which is taken from them by this act; which being designed for their benefit, it must be intended in reason that the statute leaves them a like remedy. These are my reasons, and I do not see any to the contrary.

* [493]

Cafe 797.

* The King against Stukely.

If a coroner in taking an inquisition *super visum corporis*, exclude some of the jurors sworn, in order to find the deceased *non compos*, the Court will grant an information against him, and order a new enquiry.

STUKELY was coroner of *Dorsetshire*; and a person having killed himself, as there was reason to believe, feloniously, for that he had made a formal will just before; and this coroner having sworn the jury to inquire, finding the evidence given very strong, took off some of the inquest.

2. C. Holt, 167.
Post. 496.
Cro. Eliz. 371.
1. Mod. 82.

HOLT, *Chief Justice*. It is not in a Judge's power to take off a jurymen after he is sworn: and though this coroner be a weak silly man, yet that is no reason why there should not be AN INFORMATION against him; for such men must learn they must not thrust themselves into offices. The return of the inquisition finding the deceased *non compos*, not being filed, it was quashed by the Court. HOLT, *Chief Justice*, cited a case of one *Tombs*, who had killed himself at *Highgate* in the year 1655, and the inquest was set aside for practice. And he said, if there be a new inquest, it must be by those that had the view of the corpse.

Carth. 72. 1. Vent. 181. 352. 3. Mod. 80. 100. 238. 1. Salk. 190. 3. Hawk. P. C. ch. 9 l. 56.
1. Stra. 69. 1. Hale, 413. 2. Hale, 59, 69. 1. Bac. Abr. 496.

Cafe 798.

Anonymous.

Bail may plead
usurious contract.

HOLT, *Chief Justice*. The bail to the action may plead an usurious contract, though he be not privy to it.

A special plea is
no plea till paid
for.

And a special plea is no plea till it be paid for; but if the party accept it without insisting upon that, it will be well (a).

1. Sellen's Pract. 327. 2. Strange, 1260.

(a) See Anonymous, post. 496.

Cafe 799.

How against Acton.

Rule for judgment.

PER CURIAM. If there be a rule for judgment in one Term, it must be entered before the *effoin-day* of the next Term; or else they must go over to the next Term by *continuance*, and enter it as of the second Term.

1. Stra. 639.
6 Mod. 59. 191.
Tidd's Pract.
695. 1. Sellen's Practice, 497, 498.

Cafe 800.

Anonymous.

If costs taxed
are not paid,
attachment
goes.

PER CURIAM. Upon costs being taxed by the *master*, upon an order of reference of an attorney's bill, if the costs be not paid, an attachment shall go.

2. H. Bl. Rep. 248. Tidd's Pract. 676. 1. Sellen's Practice, 530.

Anonymous.

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Anonymous.

Cafe 801.

PER CURIAM. If a witness, which is not likely may be had at a trial, be examined before a Judge, and cross-examined by the other party, and his depositions put in writing; yet if at the trial it be proved, that the party might have him there, his depositions are not to be read (a).

Depositions taken in perpetuum rei memoriam shall not be read if the deponent can be subpoenaed.

(a) See *Benson v. Olive*, 2. Stra. 286. *Baker v. Fairfax*, 1. Stra. Bull. N. P. 239. 980. *Bunb. 248.* *Tilley's Case*, Salk. 101.

* [494]

* Anonymous.

Cafe 802.

UPON MOTION to estreat a recognizance, the other side ought to have notice. Recognizance,

The King against Eller.

Cafe 803.

HOLT, Chief Justice. If an innocent person receive money upon a forged note, not knowing anything of the forgery, it is no crime in him; but he shall answer for the money solely (a).

Money paid on a forged authority may be recovered back.

But receiving money upon a forged note, knowing the forgery, is a publication of the forgery. Publication of forgery.

(a) See *Jacob v. Allen*, 1. Salk. 27. *Robson v. Eaton*, 1. Term Rep. 59. *Pond v. Underwood*, 2. Ld. Ray. 1210. *Allen v. Dundas*, 3. Term Rep. 125. *Greenway v. Hind*, 4. Burr. 1986. *Cheap v. Allen*, 3. Term Rep. 127.

Anonymous.

Cafe 804.

HOLT, Chief Justice. If writ of error pending, the plaintiff die, and execution be taken out without acquainting the Court therewith, it will be set aside for irregularity; *secus* if the Court be apprised of it.

Execution pending error, must be by leave of the Court.

Tidd's Pract.

719. 721. 1. Stra. 302. 2. Stra. 1241. Selton's Pract. 544.

West against Chamberlain.

Cafe 805.

IN DEBATE concerning evidence to be given about the corporation of *Tiverton*,

Where original is evidence, copy is.

PER CURIAM. Wherever an original is evidence, a copy of that original will be evidence too (a).

(a) See accordingly *Gilbert's Law of Evidence*, 3d edit. 48. *Lynch v. Clerke*, 593. *Wise v. Barlowe*, Dougl. 171. *Tillard v. Shebbear*, 2. Will. 366. 3. Salk. 154. *Rex v. Gordon*, Dougl.

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Leave to inspect
corporation
books.

AND IT WAS ALSO DIRECTED, that the adverse party in this case should have sight of the corporation books, and leave to take copies; but not that the books themselves be produced (a).

(a) Under what circumstances the Court will grant inspection of books, see Mr. Nolan's note to the case of *Rex v. The Hostmen of Newcastle*, 2. Stra.

1223. where all the cases upon this subject are collected and arranged under their respective distinctions.

Cafe 806.

Anonymous.

Action against a
sheriff.

HOLT, Chief Justice. An action will lie against a sheriff for not returning *good issues* upon a *disfringas*.

See *Raban v. Plaistow*, 3. Burr. 2726. and 10. Geo. 3. c. 59.

Cafe 807.

Holm against Hunter.

Goods taken on
a *levari* cannot
be delivered in
execution.

IN TRESPASS for taking goods, the defendant justified by a judgment in a court-baron, and that the goods were taken by a *levari*, and delivered to him, being plaintiff, in execution. To this there was a demurrer.

Gillb. Ex. 28.

Judgment was given for the plaintiff; for that goods so taken cannot be delivered in execution, but perhaps they might sell them, and so raise the money, or have appraised them.

Process of a
court-baron.

Another doubt was, whether a *disfringas*, and not a *levari*, was not the proper process.

Q. If a court-
baron can hold
pleas.

THIRDLY, Whether a manor, *quatenus* a manor, has a court-baron to hold pleas; it is * true it has *eo nomine* a court-baron to have suit, but it was doubted whether to hold plea without prescription.

* [495]

Cafe 808.

Homes against Barneham.

A bond for *quadraginta liberis* is
good.

DEBT UPON A BOND conditioned for the payment of twenty pounds. Upon *oyer* it appeared to be "*firmiter obligari in quadraginta liberis*," yet the plaintiff had judgment.

2. Roll. Abr.

142. Hob. 119. Cro. Jac. 146. 338. 10. Co. 133. Cro. Eliz. 896. Yelv. 225. Jones, 366. Salk. 462. 2. Lev. 166. 5. Com Dig. "Obligat. on" (B. 3.). Shepherd's Touchstone, ch. 21. p. 369, 370. and 4. Geo. 2. c. 26.

Cafe 809.

Tosen against Skipper.

Suit in the spi-
ritual court, for
calling a woman
whore in *London*,
prohibited.

LIBEL in the spiritual court for calling a woman "*a whore*;" and a prohibition was moved for upon a suggestion of the custom of *London* to punish whores, and that the words were spoke in *London*; and it was granted. And it was said, that the way of proceeding against whores in *London*, is by information in the mayor's court (a).

Cro. Car. 110.
2. Roll. Abr.

297. 1. Sid. 404. 1. Mod. 22. 1. Vent. 7. 61. 220. 2. Lev. 63. Bunb. 260. 312. 1. Stra. 555. 2. Stra. 823. Fort. 347. 4. Burr. 2033. Cowp. 422. 2. Term Rep. 473. 6. Com Dig. "Prohibition" (G. 14.).

(a) But see the case of *Argyle v. Hunt*, 1. Stra. 187, 188. S. C. Fort. 347. S. C. cited 3. Atk. 52. Blackquiere v. Hawkins, Dougl. 364.

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Palmer *against* Staveley.

Case 810.

INDEBITATUS ASSUMPSIT. There were two counts; and after verdict and general damages, it appeared that one of them was for money received to the defendant's own use; and though it seemed to be a slip of the clerk, yet the Court held it fatal. *Vide tamen* 1. *Mod.* 92. 1. *Sid.* 306. 2. *Keb.* 615. (a). *Assumpsit* for money had to the use of the defendant, and good after verdict.

S. C. post. 519. S. C. Salk. 24. S. C. Comy. 115. 4. *Bac. Abr.* 96.

(a) See S. C. post. 510. *contra.* and *Nofworthy v. Wyldeman*, 1. *Mod.* 42.

Anonymous.

Case 811.

AN information was filed against the defendant who set up a lottery, and afterwards ran away without drawing it (a). Information, Post. 511.

(a) But see now respecting private lotteries, to & 11. *Will.* 3. c. 17. ; 9. *Ann.* c. 6. ; 10. *Ann.* c. 26. ; 8. *Geo.* 1. c. 2. ; 9. *Geo.* 1. c. 19. ; 6. *Geo.* 2. c. 35. ; 12. *Geo.* 2. c. 28. ; 13. *Geo.* 2. c. 19. ; 18. *Geo.* 2. c. 34. ; 22. *Geo.* 3. c. 47. ; 27. *Geo.* 3. c. 1. and the decisions thereon collected 2. *Hawk. P. C.* 7th edit. ch. 92. page 493 to 523.

Anonymous.

Case 812.

HOLT, *Chief Justice.* Upon a conviction of forcible entry, the justices ought to commit the offender. If they find force, they are upon the view to remove it, and commit the offender, but not to award restitution without inquisition; and this they may do though the entry be peaceable, if the detainer be with force, in which case they may convict the offender upon the view. Justices on view of forcible entry may commit, but not award restitution.

1. *Keb.* 88. 1. *Vent.* 308. 2. *Hawk. P. C.* 7th edit. ch. 64. f. 49. 1. *Sid.* 156.

* *Atfield against* Parker.

* [496]

Case 813.

IN AN ACTION against an executor or administrator, if he plead twenty judgments, he confesses assets for above nineteen of them; and yet they must at their peril plead all the judgments in force against them; for if they fail in one of them, they shall never after take advantage of it, for the creditor shall have judgment to execute when assets come. And if the executor plead not all his judgments, he loses the right of preferring them, and may be charged in a *devastavit* for those judgments he has omitted to plead; of which see a case well reported in *Hutton*, for the pleading of the judgment is a protection of the assets which you have or may have, until the judgment be satisfied. And if one pleads five judgments, and one of them be false or fraudulent, you are saddled with the whole debt. *Per* HOLT, *Chief Justice*, and GOULD, *Justice*. Executor must plead all the judgments in force against him. S. C. *Holt*, 310. Ante, 153. 154. 411.

The King *against* Atkinson.

Case 814.

PER CURIAM. There cannot be a *melius inquirendum* where the inquisition was *virtute officii*. *Melius inquirendum* cannot be where the inquisition is *virtute officii*—Ante, 493.

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Filing the inquisition stayed till indictment tried.

An indictment was against the coroner for practice to find a *felo de se non compos*, and issue joined upon the fact; and the inquisition being brought hither, THE COURT stayed the filing thereof till the issue upon the indictment was tried.

And PER CURIAM, It is a crime in one to take upon himself an office he does not understand.

Case 815.

Anonymous.

Plea not paid for is a nullity. Ante, 493. Sellon's Pract.

HOLT, Chief Justice. When the defendant's attorney brings a plea to the plaintiff's attorney, and does not pay, the other may proceed as if no plea was tendered.

389. But now no judgment shall be signed for non-payment of issue money, but it shall remain to be taxed as part of the costs in the cause. Rule C. R. Hil. 35. Gra. 3. 2. H. Bl. Rep. 384. Same Rule B. R. Hil. 35. Gra. 3. 6. Term Rep. 218.

Case 816.

Selby against Bank.

A custom not to pay tithe for hay when employed to fodder titheable cattle is void.—So also is a custom not to pay tithe of lambs not yeaned in a particular place, in consideration of paying the tenth lamb yeaned there, where ewes fed there for any time throughout the year.

* [497]

BROTHERICK moved for a prohibition to the spiritual court, the libel being for tithe hay and lamb, upon suggestion, as to the hay, that it was cut in a certain waste within such a manor; in which manor there was a custom, that anything employed for foddering of things titheable should pay no tithe, and avers that the hay for which, &c. * was employed in foddering of sheep. As to the tithe lamb, it was suggested that there was a custom, that for all the lambs that were yeaned there, for what time soever the ewes were fed there, the tenth lamb should be paid for tithes; in consideration whereof they were tithe-free for lambs of ewes that fed, but did not yeane there. And he relied on 1. Roll. Abr. 648. where such a custom as to the second point was held good, because, as he said, it was more than was due for tithes of lamb of common right; for he said the tenth lamb of common right did not belong to the parson in whose parish they fall; but regard will be had to the place where the ewes are fed, and the ecclesiastical court will make equal distribution between the parishes where they were fed, and where they yeaned, which is excluded by this *modus*.

CHESHIRE contra. The suggestion is a plain *non decimanda* to pretend to pay no tithe hay, because he feeds his sheep with it; and cited 1. Roll. Abr. 650. 2. Cro. 47. Moor, 683. Warner's Case. And as to the lambs, it is very unreasonable, for thus by removing the ewes into another parish when they begin to yeane, the parson is ousted of his tithes, though they fed all the year before in his parish; or suppose nine fall, he shall have nothing.

HOLT, Chief Justice. Of common right tithe lamb is payable where they fall, but by canon law there is a regard to be had to the place where they were engendered and bred. And your custom for hay is void, for hay is a predial tithe; and though you feed your cattle with it, yet you ought to pay tithe. Of wood spent

Hay is a predial tithe; so corn.

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spent in an ancient messuage for husbandry, one may prescribe a *non decimando*, for that formerly tithe was not paid for wood; but you cannot lay such a custom for corn, for corn is a predial tithe, but tithe wood is settled by act of parliament, to be paid only where it was usually paid: So that if there was a custom before, the statute does not take it away; and besides, you have not said that the hay was fodder to cattle employed in husbandry, but only say that the tithe will be the better for it. And by the common law pasturage is as much tithable as hay, but the difference is pasturage being taken by the mouth of cattle, but the hay is tithable before it is levered from the ground; pasturage shall pay no tithe, but the cattle that feed it shall; but cattle of pail and plow shall pay no tithe if you feed them upon pasture all the year long; and the reason of that is, for that because they are as tools of husbandry, by which tithes are *meliorated. And no tithe is originally due by law in that case, but tithe is originally due upon mowing of the grass; and your subsequent application of it, though to cattle of pail and plow, shall not discharge you of a charge to which you were liable before upon the mowing. And the grass is tithable only in respect of the feeding, that is, the use and application makes it tithable; and for that you cannot have any other tithe than from the profit of the cattle that do feed it. And as to the other point of the lambs, one tithe in specie cannot be a discharge of another tithe in kind; and though, as I said before, tithe lamb is to be paid where they fall, yet by the received canon law there is regard to the place of feeding; and *Marsb.* 79. 1. *Mod.* 239. were cited.

SERV
against
BANK.

By common law
pasture is as
much tithable as
hay.

*[498]

Tithe hay is due,
on the mowing
it.

And after consideration THE COURT declared at another day, that no prohibition should go in either part; for as to the lambs, it is a dangerous custom, because easily converted into fraud, by taking the sheep away in yeaning time. And the other point is clear upon the case put out of *Cro. Jac. &c.* and after-math of common right is tithable, and no prohibition. PER TOTAM CURIAM.

NOTE, per HOLT, Chief Justice, *hic*. One is not bound to pay tithe lamb if he has any number under ten, because they are entire things; but if he has nine pounds of wool, he shall pay tithe for it, *viz.* by an inferior weight, as by ounces, for that is divisible.

The King against Dillon.

Case 817.

A N original order of session was made upon him for discharging his apprentice from him, pursuant to the statute of 5. *Elizabeth*. c. 4. f. 35. and ordering him to refund some of the money he had received with him.

Sessions may dis-
charge an ap-
prentice, and
order money re-
ceived to be re-
funded.

And FIRST, It was objected, they had no power by the statute to order refunding of money, but only to discharge the apprenticeship;

S. C. Salk. 67.
S. C. Holt, 68.

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THE KING
against
DILLON.

ship; and that upon inrollment of the discharge the indentures are defeated.

BUT IT WAS RULED, that clearly they have power to award a restitution by necessary consequence; for suppose he had brought a considerable sum, and had served but two months (a).

An order of sessions must state that the party was summoned.

SECONDLY, It was objected, that they had no power to make an order, but upon appearance of the master upon a summons, which is not shewed to have been here.

[499]

ANSWER. The words are indeed, "that they shall make order on appearance;" but it were hard to construe it that they shall not meddle if he will not appear, for then he would take advantage of his own wrong; but it ought to appear that he was summoned or warned to appear (b).

Sessions may make an original order to discharge an apprentice.

THIRD EXCEPTION was, That it appeared this was originally begun at the sessions, whereas they have no jurisdiction till after application to the principal magistrate of the corporation, or to a justice of peace.

Vide 1. Vent. 175.

And of this opinion was HOLT, *Chief Justice*; but upon consideration, because the precedents went the other way, he gave way to them; and the order was confirmed (c).

(a) See accordingly *Rex v. Johnston*, post. 553. S. C. 1. Salk. 67. *Hawksworth v. Hilary*, Saund. 315. 1. Mod. 2. *Rex v. Aries*, Conit's Poor Laws, 515. pl. 731. *Dutton's Case*, 2 Salk. 490.

(b) *Rex v. Gill*, 1. Stra. 143.

(c) It is a point not now to be disputed, but that the sessions have an original jurisdiction to discharge apprentices. *Rex v. Davie*, 2. Stra. 704. *Rex v. Gill*, 1. Stra. 143. See also 1. Const's P. L. 513.

Case 818.

The King against Orbevill.

Indictment for a cheat not quashed on motion.

S. C. 6. Mod. 42.
2. Show. 341.

ORBEVILL was indicted for fraudulently, unlawfully, and for wicked gain to himself, procuring another to lay money upon such a match (a); and though it had many apparent faults in it, yet being a cheat, THE COURT would not quash it upon motion (b).

(a) See *Rex v. Young*, 3. Term Rep. 98. (b) See 4. Com. Dig. "Indictment" (H.).

Case 819.

Anonymous.

In *fiire facias* in ejectment the title may be controverted.

PER CURIAM, In the case of *Proffers v. Johnson* there is this diversity between a *fiire facias* upon judgment in debt, and in ejectment; for in the last the party may controvert the original title.

The

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The King *against* Raw.

Cafe 820.

IF impertinent interrogatories be put to a person who is ordered to answer interrogatories, his way is to demur to them; for there is no way but *to answer*, or *to demur*. And there ought not to be an interrogatory leading the party to a penalty.

Non-pertinent
interrogatories
are demurrable.

Anonymous.

Cafe 821.

PARKER moved for an attachment against an officer for executing, by distress, an order of justices for levying of money for repair of a bridge, after the order was removed by *certiorari*.

Certiorari must
be delivered be-
fore any con-
tempt.

HOLT, Chief Justice. There never is any formal allowance of a *certiorari* below; but to bring one into contempt, the distress must be after the *certiorari* presented below; and if a warrant were delivered before that time, the way had been, upon producing the *certiorari*, to get a *superfedeas* of it, and deliver it to the officer, or else he cannot be in contempt.

Yelv. 32.
March, 27. 112.
Dyer, 245.
1. Salk. 148,
149.
2. Salk. 564.

* [500]

* Dillon *against* Crawly.

Cafe 822.

ERROR of a judgment upon a demurrer to evidence in the common pleas, the witness to the sealing and delivery of a deed, being *subpœnaed*, did not appear. But to prove it the party's deed, they proved an indorsement made by him thereupon three years after; reciting a proviso within, that if he paid such a sum the deed should be void, and acknowledging that the said sum was not paid; and a fine was levied of the very lands mentioned in the deed to *Crawly*, and by the indorsement he expressly owned it to be his deed; and upon this the deed was read.

An indorsement
by the party to
a deed, reciting
one of the pro-
visoes in it, and
expressly own-
ing it to be his
deed, is good
evidence, on the
absence of the
subscribing wit-
nesses, that it is
his deed.

And now it was objected, that this was not good evidence, because not the best the nature of the thing could bear, but only circumstantial; which never ought to be admitted, where better may be had *ex naturâ rei*, because circumstances are fallible and doubtful; and it is upon this reason that a copy of a record is good, because one cannot have the record itself; but a copy of a copy will not do. Upon *non est factum* to a bond, one of the witnesses being *subpœnaed* did not appear; and it was offered to prove that he owned it his bond, but denied.

S. C. Holt, 299.

HOLT, Chief Justice. Can there be better evidence of a deed than to own it, and recite it under his hand and seal?

ET PER TOTAM CURIAM, Judgment was affirmed.

How

Case 823.

How *against* Acton.

Writ of enquiry.
See Payton v.
Burdus, Stra.
1100.

HOLT, Chief Justice. If plaintiff delay the executing a writ of enquiry, till a year after the interlocutory judgment, he cannot do it afterwards without a *scire facias*.

Case 824.

Reek *against* Thomas.

Administration
durante minoritate
of executor, de-
termines at se-
venteen, of ad-
ministratrix at
twenty one.
Ante, 438.

* [501]

5. Co. 29.
1. Sid. 185.
1. Leon. 74.
2. And. 34.
3. Mod. 174.
Cro. Eliz. 43.
Skin. 155.
3. Peer Wms.
79.
2. Com. Dig.
"Administra-
tion" (F.).
5. Com. Dig.
"Pleader"
(a D. 11).

DEBT UPON A BOND by administrator *durante minoritate* of one intitled to be administrator as residuary legatee; averring that the said person was under twenty-one years; the defendant demurs, because, as appeared by his averment, his administration was determined, or at least might be so; for if the legatee were of seventeen years of age, though under twenty-one, as it was pretended, the administration of the plaintiff would cease; like to administration *durante minoritate* of an executor.

* But IT WAS RESOLVED, that there is a great difference as to this point, between administrator during the minority of one intitled to be administrator as residuary legatee, or other person, and when it is during the minority of an executor; for in the last case the administration determines immediately upon the executor's arriving at seventeen, and the infant is *ipso facto* executor before to all purposes, but to bring action. But in the other cases the administration does not determine till the legatee or other person's age of twenty-one; and there must be an act done before the legatee is intitled to administer; and this is the practice in the spiritual court; vide *Atkinson v. Cornish* (a), and *Dubois v. Dubois* (b).

Ante, 438.

So NOTE the diversity; for when it is granted during minority of such a one executor, that is during his minority *quatenus* executor, which is till seventeen; but when it is during minority of J. S. or residuary legatee, that is till the legal age of twenty-one. And there is an interest vested in the administrator by act of parliament upon the grant of the ordinary; so that if it be during the minority of one appointed executor, his time to administer is till seventeen, and when that comes his authority ceases: But in the other case the sense of the word "minority" is left to construction upon the act of parliament, and that must be according to common law of legal age.

Judgment was given for the plaintiff.

(a) 3. Danv. 356. p. 9. 5. Mod. 395. Comb. 475. Carth. 446. Ante, 194. Holt, 43. 1. Ld. Ray. 338.

(b) *Dubois v. Trant*, ante, 436.

Anonymous.

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Anonymous.

Cafe 825.

PER CURIAM. It has been held once, that if the plaintiff had been non-prossed in a former action, that if he began again he should have but common bail; but this has not been abided by, but a *non prof.* in a former suit is evidence of a vexatious prosecution.

Spuraway against Rogers.

Cafe 826.

ACAPIAS was returnable the first day of *Hilary Term*, and the afternoon of that day a writ of error was brought returnable in *cam. scacc.* the next day.

Whether suing out a writ of error, or the notice of it, be the *superfedeas*.

HOLT, Chief Justice. It has been a *vexata questio*, whether the suing out the writ, or the notice thereof to the plaintiff or his attorney, were what superseded the execution; if the writ be *tested* after return of the *capias*, it does not supersede it. If a *capias* be out, and execution thereon, and then writ of error, it shall not discharge the execution. And the antient opinions have been, that a writ of error is a *superfedeas* from the actual purchasing of the writ, but that the party shall not be punished for executing it till notice, but that still it avoided the execution. And if a *capias* be taken out and executed within four days after return of *THE POSTEA*, it is ill; *sectus* if taken out within the four days, and executed after; and if there be not four days in Term after return of *THE POSTEA*, they must be made up in Vacation before execution executed.

1. Ven. 30.
Salk. 321.
6. Mod. 130.

* [502]

BUT NOTE, Clark, the secondary, told me, that a writ of error was not a *superfedeas* till a certificate taken out from the clerk of the errors and served on the party. *Parker v. Woolaston*, 6. Mod. 130. (a).

(a) S. C. Salk. 321. S. C. 2. Ld. 390. Dudley v. Stoker, 2. Black. Rep. Ray. 1256. 1260. See Sweetapple v. 1182. Lane v. Bacchus, 2. Term Rep. Goodfellow, 2. Stra. 867. Smith v. 44. Capron v. Archer, 1. Burr. 342. Nicholson, 2. Stra. 1186. S. C. 1. Wilf. Jaques v. Nixon, 1. Term Rep. 279. 16. Parry v. Campbell, 3. Term Rep.

Anonymous.

Cafe 827.

AN INDICTMENT for a riot concluded "*contra formam* An indictment for a riot concluding *contra formam stat.* is good.

THE EXCEPTION was, That a riot was a common-law offence, indictable independently of any statute; and therefore the conclusion was ill.

1. Salk. 370.
Cowp. 30.
2. Hale, 190.
4. Hawk. P. C.

HOLT, Chief Justice. Though it be not made an offence by any statute, yet divers statutes there are directive of the manner ch. 25. f. 115, 116, 117. and Rex v. Mathews, Hilary Term, 33. G. 3. where it is decided, that in an indictment for an offence at common law a conclusion of *contra formam statui* may be rejected as surplusage. 5. Term Rep. 162.

of

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Anonymous. of punishing of it, and that is reason enough to make the conclusion good. As upon the statute of Stabbing, the thing was felony before, but clergy is ousted by the statute; and yet an indictment for that sort of felony does conclude *contra formam stat.*; though the statute does not make the offence, for it was felony before; on the other hand, an indictment would be well without concluding upon the statute in that case; so both ways are good (a). So in case of barrettry, you may conclude an indictment "*contra formam statuti*," or "*diversorum stat.*" or take no notice of any statute at all; for wherever there was an offence at common law, and a statute makes a further provision of penalty, an indictment for that offence may conclude "*contra formam stat.*" or leave it out, at election.

Another Exception was, That it was not said in the caption of an indictment good, that the jury were "*jurat. et onerat. ad tunc et ibidem.*"

But no heed was taken to it.
1. Keb. 101. 2. Keb. 367. 2. Jones, 180. See 4. Hawk. P. C. ch. 25. f. 17. and f. 126. that the omission of the word *onerat.* is not fatal, if there be the word *jurat.* for that fully implies it.

An indictment for a riot not quashable on motion. And HOLT, *Chief Justice*, further said, that it was not usual to quash indictments for a nuisance, riot, or any other public offence, on motion; but in case of petit riots, upon a contest of right of common, it had been often done.
Ante, p. 99.

(a) See Anonymous, ante, 446.

* [503]

Case 828.

* Atkinson against Morrice.

Condition precedent.

ACTION ON THE CASE for so much money promised for the use of a coach and horses for a year.

S. C. Holt, 148.
Ante, 455.

Upon the evidence before HOLT, *Chief Justice*, at Guildhall, Morrice agreed to give Atkinson so much for the use of a coach and horses for a year; and Atkinson agreed further with Morrice to keep the coach in repair; it was averred, the coach and horses were delivered to Morrice, but nothing of the repair.

And HOLT, *Chief Justice*, held, upon this evidence, that repairing was not a condition precedent, and therefore need not be averred; but if the agreement had been, that Atkinson had agreed to give Morrice a coach and horses for a year, and to repair the coach, and that for that Morrice promised so much money, then the repairing had been a condition precedent, necessary to be averred. And though in this case it was not expressly averred, that Morrice had the use of the coach for a year; yet it being said it was delivered to him, it shall be so intended, if contrary be not shewn of the defendant's side.

And judgment for the plaintiff above.

Anonymous.

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Anonymous.

Cafe 82d.

PER CURIAM. Where a whole county is concerned in a trial, as in an information for not repairing a highway, or a common bridge, the trial shall be by a jury of a neighbouring county; and a suggestion must be made upon the roll of the cause of its being tried in another county, *viz.* that it concerns the whole county (*a*).

(*a*) Mayor of Poole v. Bennett, 3. Burr. 1564. Rex v. Amery, 1. Term 2. Stra. 874. Mayor of Bristol v. Proc. Rep. 363. Mayor, 1. Will. 298. Mylloch v. Saladine,

Where a whole county is concerned in a trial, it shall be by a jury of a neighbouring county.
1. Vent. 61.
6. Mod. 192.

Vezey against Smith.

Cafe 83b.

INDEBITATUS for goods sold and delivered, against a woman, who pleads in abatement "coverture" at that time. The plaintiff replies, that she was sole, and not covert, and concludes to the country.

It was objected, that the replication was ill; for that it should have been taken with an **ABSQUE HOC**, that she was covert, and not as here, and not covert. And the case of *Nichols v. Baw* (*a*), and 1. *Saund.* 21. was quoted; in debt upon a bond the defendant pleaded, that the plaintiff was an alien enemy; replication, that he was born in *England*, and not an alien, without laying any place for *venue* but as here; but they could not tell the judgment of that case.

* **HOLT, Chief Justice.** If such plea be to a writ, it need no *venue*, but may be tried where the writ is brought; but if it be pleaded in bar, there must be a replication, and that must set forth the place of the party's birth in *England*, from whence a *venue* may be; and though precedents be both ways, yet this is a true difference, and according to *Co.* and he said, the defendant must shew and prove the *coverture*; and saying in the replication that she was sole, implies the negative of a marriage, as much as that she was not covert; and it is the same as pleading of infancy. If this had been a bar, the marriage must have been laid at a certain time and place; but being in abatement, it is well generally; but even there the husband's name ought to be shewed, that the plaintiff may know whom to have his writ against.

* [504]

Vide the first case in the next Term.

(*a*) 6. Will. 3.

Anonymous.

Cafe 83i.

PER CURIAM. Though a declaration be delivered as of a Term before, yet, if the rules of pleading be not out, one may plead in abatement the subsequent Term.

Anonymous.

If rules for pleading be not out, one may plead in abatement.

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Case 832.

Anonymous.

Master and servant.

HOLT, *Chief Justice*. A lieutenant of a man of war may give moderate correction to a seaman, but not wound him, for that is not moderate correction.

See the case of *Swinton v. Molloy*,

1. Term Rep. 537.

Case 833.

Anonymous.

Indictment.

INDICTMENT, concluding *ad nocumentum* of inhabitants of a certain vill, was quashed for the special conclusion.

2. Roll. Abr. 83.

6. Mod. 453.

Cro. Eliz. 90.

1. Vent. 26.

1. Mod. 207.

1. Saund, 135.

1. Vent. 208.

2. Hawk. P. C. 7th edit. ch. 75. f. 3. Sayer, 167. 261.

Case 834.

Anonymous.

Chapel, what.

PER CURIAM. A chapel's having sacramentals only, makes it not independent of the parish, but it must have all other badges, as sepultures, &c.

2. Burn's E. L. 273.

Degge's Parson's Lawyer, 1. c. 12. Ken. Par. Ant. 590, 591. 2. Roll. Abr. 290. 1. Salk¹ 164, 165.

EASTER

E A S T E R T E R M,

The Thirteenth of William the Third;

I N

The Common Pleas.

Sir Thomas Trevor, Knt. Chief Justice.

Sir Edward Nevill, Knt.

Sir John Powell, Knt.

Sir John Blencowe, Knt.

Edward Northey, Esq. Attorney General.

Sir John Hawles, Solicitor General.

} *Justices.*

Anonymous.

Cafe 835.

THE case was debt upon a bond for a great sum of money; the defendant pleaded, that the condition was for a parson's resigning his benefice; and demurrer.

General bond for resignation of a benefice, good.
Cro. Car. 180.
1. Jones, 220.
Hutt. 111.
1. Vern. 411.
Prec. Chan. 513.
2. Chan. Rep. 398.

POWELL, *Justice*. I am of opinion, that when first the Judges held these bonds good, if they had foreseen the mischief of them, they would have been of another opinion; but now that opinion has prevailed, and it is supported only by the possibility that it may be to an honest intent*; as that the patron may have a son of his own capable of the benefice, or that he should voluntarily resign in case of non-residence, which may rather argue care in the patron than any corruption of simony; but if these were the real motives, why should they not be specially expressed in the condition? But such a bond as this is to resign generally; it may be the parson could not have the benefice without it, he is thereby tempted to strain a point rather than be without a living, and the common use of them is to have the money; and surely if the thing be simony, a bond for it will be void. And my Lord Coke's notion is not law, where he says, that since the bonds are good, there shall be no averment of simony upon it. The statute 31. Eliz. c. 6. makes the church void, and gives the presentation to the

* [505]

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L 1

king;

Easter Term, 13. Will. 3. In C. B.

ANONYMOUS. king; and simony was against law before, and simoniacal agreements were void before that statute, though simony itself was only punished in the spiritual court. And he said the case of *Gregory v. Oldbury* (a) was not law, where an averment of its being a simoniacal contract, and the patron and incumbent are privies to it; and if there be any simoniacal consideration, they both must know it. And he quoted a case, where in an action upon such a bond the defendant brought the plaintiff by bill into chancery; and because he could not give a good account of the cause of taking such a bond, a perpetual injunction was granted. But here we cannot set aside this bond without a special cause shewed in pleading, which is not done.

BLENCOWE, *Justice*. You assign no simony, but put it upon the plaintiff to shew none, which he need not do, because we cannot intend it to be such, since it may be otherwise; and here is a particular circumstance why it should not be thought simony here, because it is in a sum much above the value of the benefice; if indeed it had been for a sum of less value, it might be intended perhaps the parson would rather pay it than resign. And he remembered *Justice* TWISDEN said he had known such a bond held good twelve times; so it would be hard to oppose it now, there appearing no simony in the condition, the defendant not averring any.

And, POWELL and BLENCOWE, *Justices*, being only in court, judgment was given for the plaintiff (b).

(a) Moor 641.

(b) See accordingly *Jones v. Laurence*, Cro. Jac. 248. 274. *Babington v. Wood*, Cro. Car. 180. *Watson v. Baker*, Raym. 375. *Graham v. Graham*, 1. Vin. 131. *Grey v. Hesketh*, Amb. 260. *Peel's Case*, 1. Stra. 227. However, in the case of the Bishop of London *v. Fytche*, Cunningham's Law of Simony, 52. it was determined by the House of Lords, contrary to the opinion of the Courts of King's Bench and Common Pleas, that a general bond of resignation is simoniacal and illegal: but a bond given by an incumbent to the patron on presentation to reside on the living, or to resign if he

did not return to it after notice, and also not to commit waste, &c. on the parsonage house, is good. *Bagshaw v. Boscley*, 4. Term. Rep. 78. So also judgment was given for the plaintiff in debt on a bond of resignation, with condition to reside, to resign for the patron's son to be presented, and to keep the premises on the living in repair. *Partridge v. Whiston*, 4. Term. Rep. 359. See also on this subject Mr. Christian's Observations, 2. Black. Comm. page 280, note (8.) 4. Black. Comm. p. 62. note 8. and Mr. Frazer's edition of Burn's Eccl. Law, 3. fol. page

* [506]

Case 836.

* Walker against Humphry.

A *fiat facias* issued in Hilary returnable *tres Mich.* is bad.

FIAT facias was taken out in Hilary Term, returnable *tres Mich.* and the Court, being acquainted with it, ordered they should shew cause why it should not be superseded; for this would take away all renewal of process.

And

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And *PER CURIAM*, *Capias* of process must have continuances, and, for that, must be from Term to Term; but writs of execution need none, and for that may have a longer return.

Process must have continuances, but writs of execution need none.

Pell against Garlick.

Case 837.

IN trespass for breaking the plaintiff's close, and keeping and impounding his horses, and for breaking a close called "*Old Ground*" in such a vill; the defendant pleads to issue as to the *vi et armis*, and as to the taking of the horses, that he was *possessed* of a certain close called *A*. and found the horses there *damage feasant*, and for that took and impounded them; and "*quoad residuum transgressionis*," that there were many closes in that vill called "*Old York Close*," but none without a further addition. That the *locus in quo* was called "*Yalden Old-York*," and that the defendant was seised thereof in his demesne as of fee. To which there was a demurrer.

In trespass, justification, without shewing the commencement of his estate, or that freehold was in him.

S. C. 2. Lutw. 1489.
S. C. New Lut. 478.
2. Vent. 292.
Cio. Jac. 43. 123.
4. Mod. 419.
423, 424.
2. Lev. 148.
3. Lev. 133.
3. Mod. 49. 132.
1. Salk. 360.
2. Mod. 70.
2. Salk. 643.
3. Term. Rep. 265.

CARTHEW for the plaintiff maintained the demurrer, for that the defendant justifies by his possession, without shewing the commencement of his estate; or that the freehold was in him: and it is a rule, that any man who makes a title to himself by a particular estate, or would justify under it, ought to shew the commencement of it, that the party may thereby have an opportunity to traverse it. *Co. Lit.* 303. *b* *Mar.* 1. *Cro. Eliz.* 171. *Cro. Car.* 138, 139. But it is insisted on, that this is an exception of the said rule, and that the plaintiff could not take issue upon the commencement of the title here, if it had been set forth; but against that he quoted the case of *Saunders v. Hussy* (a), and the case of *Silly v. Dally* (b), both in avowry, which he said were much stronger than this, an avowry being in nature of a declaration.

ANOTHER EXCEPTION was, That the defendant justifies in another close than where we lay the trespass, and laying the freehold in * himself, he might have pleaded "not guilty;" and as they have pleaded, they leave nothing for us to reply, without departing. [507]

LUTWICH contra. The justifying by a *possessionat. fuit*, without more, is well in this case, though I agree it would not be so in an avowry, because that comprehends a title in itself, but this is in trespass for goods taken in *D.* which must be intended a vill; and he took this diversity; if the plaintiff had declared *quare clausum ipsius quer' fregit*, this plea had not been good, because the declaration lays the possession in the plaintiff: but here

(a) In the Court of Common Pleas, 9. Will. 3. Roll. 747. 2. Salk. 562. Comb. Trinity Term, 8. Will. 3. Roll. 336. 476. Carth. 444. Ante, 190. Holt, 610. 2. Lutw. 1231. New Lutw. 390. Carth. 9. 1. Id. Ray. 331. 1. Brown's Cases in (b) In the Court of King's Bench, Paul 74.

Easter Term, 13. Will. 3. In C. B.

Plea
against
CARLICK.

it is generally *quare clausum fregit* in *D.* leaving it indifferent whole close it was. So, for any thing appears in the declaration, the title is collateral, and will not come in question; and for this he quoted *Serle v. Puddian* (a) and *Langford v. Wells* (b), and this diversity he insisted on to be a good ingenious one; for if the defendant has possession, why may he not justify by virtue of it? But where the plaintiff alledges it to be his, as in a *quare clausum ipsius quer. fregit*, there the defendant must answer that allegation, and therefore must shew his title, and cannot shew a possession without shewing the commencement of it; and the reason of the diversity is, because in the one case the title of the land comes in question, in the other not. And he quoted *Cro. Car.* 138.

And as to THE OTHER POINT, it is well enough, for we say there were several closes called "*Old Ground*," but none without a further addition; and this is only inducement to our plea, *Moor* 25. In detinue for goods bailed it was pleaded, that after the bailment the plaintiff married *J. S.* who released to the defendant, and held not to be double, for he could not plead the release without shewing the marriage. 5. *Hen.* 7. 38. a rule is laid down, that when a man has two matters, he may plead either of them; and if he cannot come at one without alledging the other, the alledging it will not make his plea double. *Vide Gouldsbrough* 88. *Br. Double Plea*.

* [508]

And as to the objection, That the plea is the general issue; it is no more than the common bar of *liberum tenementum* to enforce the plaintiff to give a more precise certainty of the place where the trespass is supposed; for if he had said that the trespass was in *Black-Acre*, we could not plead that it was in *White-Acre*, though *Littleton* and *Brook*, in 21. *Edw.* 4. be of a contrary opinion; but the matter of inducement here is consistent with the declaration of the plaintiff, for the defendant admits there are * many closes in *Dale*, called as the plaintiff shews, but he says they have all additions; and then it is necessary to give further certainty, so that we may know which of them to plead to. And several of these closes may be the plaintiff's, and we may be not guilty as to one of them, have a release as to another, and plead an accord with satisfaction to a third; and this we cannot do without the plaintiff assigns a further certainty. 21. *Edw.* 4. 80. 81. Trespass laid in two acres of land in *D.* the defendant pleads that the place where was called by such a name, and pleads to it; and though it was held the declaration had sufficient certainty *prima facie*, yet it was held the defendant might give particular names to them for greater certainty; and the reason is, for that the plaintiff might be seized of six acres, of which two might be called by one name, two by another, and two

(a) *Serle v. Bunion.* 2. Mod. 78.
3. C. 3. Salk. 210.

(b) *Langford v. Webber.* 3. Mod. 132.
3. C. Carth. 9. S. C. 3. Salk. 356.

by

by a third name; and the defendant might have committed trespass in every one of them, and he ought to know for which of them the action is brought, that he may distinguish what plea to make. And here calling the place in which the trespass is laid *Old-Ground*, is not so certain but it may be more certain; and such plea can be no harm to the plaintiff, for if he prove trespass in any of them, besides where the defendant justifies, he shall recover; and if it be only where he justifies, he may controvert the cause of justification. *Vide* 9. Hen. 6. 5. Trespass in *D.* without addition, and there is no *D.* without addition; yet if he prove trespass in *D.* it will be for him.

PELL
against
GARLICK.

POWELL, *Justice*. In assize and trespass, which are general, the law allows the general plea of *liberum tenementum*, and that is the common bar; but it will not do where there is a special assignment; but the use of it is to enforce the plaintiff to make his charge certain, and it is only a favourable plea; for the plaintiff may have a title, of lease suppose, consistent with the plea; so if he has such special title, that plea affords him an opportunity of shewing it, and *liberum tenementum* is traversable; and besides if the plaintiff has any other plea, he may come with a *bene et verum est*, that it is the defendant's *liberum tenementum*, and shew his special cause of action; so where the defendant pleads *liberum tenementum*, he gives a plea traversable; but the plea here tendered is not traversable, and yet it puts him to make his title, which ought not to be without allowing him a traversable plea; and besides, the title may come in question upon the taking of goods. And one cannot plead his possession in bar without more, except it be in the case of battery*, where it may be merely collateral; and the true diversity is between a declaration and a plea, for one may count upon his possession without more, but not justify by virtue of it; for you can never give possession in bar without making a title.

In assize and trespass *liberum tenementum* is a good plea, but not where there is a special assignment.

6. Mod. 117.
Dyer, 23.

2. Cro. 59.

Cro.. El. 137.

Raft. 548.

liberum tenementum is traversable.

* [509]

Possession without more, cannot be pleaded in bar, except in case of battery.

One may count on possession without more, but not justify without making a title.

As to THE OTHER POINT, it is very true, when a trespass is laid in a place certain, it bars the other from saying that it was in another place; but here he does own there is such a place, but that it has an addition; but why should not you confess the declaration, and give in evidence a trespass done in *Old-Ground*, with the addition? *Yelv.* 166.

Yelv. 166.

And PER CURIAM, Judgment for the plaintiff, *nisi*.

Anonymous,

Case 838.

POWELL, *Justice*. If *A.* promise *B.* ten pounds, in consideration that he would procure him one who would give him an annuity of one hundred pounds *per annum* for nine hundred pounds, *B.* does not do it, but procures him one who grants it for one thousand pounds, and *A.* does agree for that annuity; *B.* cannot bring an *assumpsit* for the ten pounds, because this varies from the contract, but he may have a *quantum meruit*.

Assumpsit must be on the particular contract.

E A S T E R T E R M,

The Thirteenth of William the Third,

I N

The King's Bench,

At the Sittings

A T

The Guildhall

B E F O R E

Sir John Holt, Knt. Chief Justice.

Case 839.

Anonymous.

An action lies to recover money received in account to another use.

IN account, the case on evidence was this: *A.* gives a note to *B.* upon *C.* for *B.* to receive it for the use of *A.* *B.* owes *C.* money, and *C.* upon this note discharges *B.* thereof; whereupon *A.* brings his action against *B.* and it lies.

Agent not liable for taking insufficient security.

HOLT, Chief Justice. If *A.* be entrusted with the money of *B.* to lay it out, and *A.* lend it to one who passes for a substantial able man at that time, and takes a reasonable security for it, as his bond, &c. and afterward the other becomes insolvent, *A.* shall not be charged.

Case 840.

Anonymous.

Those who abet rioters by hallooing, are principal offenders.

AN indictment was against several of the boys of *Christ's-Hospital*, for a riot upon the prosecutor.

It was proved that two of them beat her, and that the rest only hallooed.

HOLT,

Easter Term, 13. Will. 3. In B. R.

HOLT, *Chief Justice*. As many as hallooed are abettors, and therefore principals in the case (a).

But the jury acquitted all but two, wherefore the plaintiff's Counsel desired they should be all acquitted; for two alone cannot be guilty of a riot, but there must be three at least, and battery cannot be found upon this indictment.

(a) *Sir Rex v. Royce*, 4. Burr. 2073.

Anonymous.

Cafe 841.

IF I draw a bill of exchange in payment, and the party does not call for the money from the drawee in convenient time, and he fail, he shall then come upon the drawer. *Sed vid. comment ante 408 (a)*.

Bill must be demanded in convenient time. Ante, p. 203. Post. 521.

(u) That the payee or indorsee of a bill of exchange must apply in convenient time to the drawee for payment of it, in order to entitle him to recover against the drawer, see 3. & 4. Ann. c. 9. f. 7. *Blissard v. Hirst*, 5 Burr. 2671. *Gee v. Brown*, 2. Stra. 792. *Chamberlain v. De la Rine*, 2. Will. 353. *Coleman v. Sayer*, 2. Stra. 829. *Allen v. Dockrill*, 1. Salk. 127. *Pepys v. Lambert*, 1. Stra. 707. *Anson v. Bailey*, Bull. N. P. 276. *Appleton v. Sweetapple*,

Espin. Dir. 58. *Tindal v. Brown*, 1. Term Rep. 167. *Fletcher v. Sandys*, 2. Stra. 1228. *Ward v. Evans*, post. 521. *Moor v. Warren*, 1. Stra. 415. *Turner v. Mead*, 2. Stra. 910. *Hayward v. Bank of England*, 1. Stra. 550. *Bank of England v. Newnan*, 1. Ld. Ray. 442. *Anonymous*, 1. Vent. 45. *Daglish v. Witherby*, 2. Black. Rep. 747. *Brough v. Perkins*, 2. Ld. Ray. 993. *Goodall v. Dolley*, 1. Term Rep. 712.

* The King against Wharton and Others.

* [510]
Cafe 842.

INDICTMENT was for riot against *Policarpum Wharton*, and others; but the cause of the riot being the right of a private river,

A river is the property of the owner of the lands adjoining to its banks. S. C. Holt, 499. Brid. 47.

HOLT, *Chief Justice*. If a river run contiguously between the land of two persons, each of them is, of common right, owner of that part of the river which is next his land; and may let it to the other, or to a stranger.

SECONDLY, If one see his neighbour erecting a thing which will be a nuisance, he cannot abate it till it become an actual nuisance; so the maxim of *Præstat cautela quàm medela* holds not in this case.

A nuisance must exist before the cause of it can be abated.

THIRDLY, If one has a river, and for want of scouring it the neighbouring land is overflowed, he is indictable for it.

Landholder indictable for not cleansing his ditches. 2. Roll. Abr. 137. March, 26. 1. Vent. 50. 183. 189. Cro. Car. 36. 2. Hawk. P. C. ch. 75. f. 11. ch. 76. f. .

FOURTHLY, Unlawful assembly, riot, and rout, are three different offences.

Riot, &c. 2. Hawk. P. C. ch. 65.

E A S T E R T E R M,

The Thirteenth of William the Third,

I N

The King's Bench.

Sir John Holt, *Knt. Chief Justice.*

Sir John Turton, *Knt.*

Sir Littleton Powys, *Knt.*

Sir Henry Gould, *Knt.*

} *Justices.*

Edward Northey, *Esq. Attorney General.*

Sir John Hawles, *Knt. Solicitor General.*

Case 843.

Palmer against Stavely.

Indebitatus for money received to the use of defendant helped by verdict.

S. C. ante. 499.

S. C. Salk. 24.

S. C. Comy. 115.

S. C. 1. Ld. Ray.

669.

4. Mod. 161.

4. Bac. Abr. 96.

CASE upon two several promises, and a verdict on both. The first declaration was very special, setting forth that the defendant did set up a lottery, and a fraud in the managing it. The second was an *indebitatus*, for money received by the defendant for the plaintiff, and laid *ad usum* of the defendant.

IT WAS MOVED in arrest of judgment, for *assumpsit* lies not for money received by one to his own use.

TO WHICH it was answered, That this being after verdict, to understand it according to the words of the declaration, would directly contradict the verdict; and saying that it was for money received for the plaintiff, was sufficient, without saying *ad usum*, &c. and therefore the *ad usum* superfluous, being contradictory, ought to be rejected. *Nesworthy's Case* (a) in point.

Verdict helps such faults as must be given in evidence to obtain a verdict. Ante, p. 432.

And it was laid down for a rule, That whatever imperfection there be in a declaration, if it be such as must necessarily be given in evidence to obtain a verdict, it shall be cured by the verdict. And the case of *Paterfon v. Milton* (b) was quoted, where the declaration was, that the plaintiff was indebted to the plaintiff,

(a) 1. Mod. 92.

(b) 4. Mod. 161.

and

Easter Term, 13. Will. 3. In B. R.

and that the defendant promised to pay; and held good after verdict. 1. *Sid.* 306. That the defendant being indebted to the plaintiff for goods sold and delivered, the plaintiff promised to pay to the plaintiff, good after verdict. 2. *Keb.* * 615. Plaintiff declared, that the defendant was indebted to him in fifty pounds, for money had and received to the use of the defendant; and after verdict the plaintiff had judgment. * [511]

But to this it was objected, That it is very true the Court may reject words that are repugnant in themselves, and inconsistent to what went before; but they cannot reject words repugnant or destructive of what went before, if they are sensible: and here it is good sense to say, that the defendant received money for the plaintiff to his own use; as if the plaintiff owed the defendant ten pounds, and *J. S.* owed the plaintiff ten pounds, and the plaintiff appoints the defendant to receive the ten pounds from *J. S.* for his debt; that would be money received by the defendant for the plaintiff, to the use of the defendant. But it was replied, If that were the case, the jury could not have found for the plaintiff.

HOLT, *Chief Justice*. In debt one never lays a promise, but only the debt; but in *assumpsit* there is a contract in law to pay what you received to another's use. And though a promise be laid ever so express, yet if you do not shew the cause of the promise, it will not bear an *assumpsit*, though you give ever so just a debt in evidence; because it may be debt by specialty or a rent, whereof *assumpsits* do not lie, if it be not for forbearance of the payment after it is due. So it will not be enough to say, that the defendant being indebted to you in so much money, he promised to pay you, even after verdict.

In *assumpsit* the cause of the promise must be known.

Ante, p. 16.

And here *PER CURIAM*, Judgment *nisi* was given for the plaintiff.

And HOLT, *Chief Justice*, informed the Court, that he had bound the defendant to his good behaviour, for cheating the public, in getting their money into his lottery, and running away without drawing it.

Person bound to good behaviour for cheating in a lottery.
See S. C. ante, 495.

Anonymous.

Cafe 844.

PER CURIAM. An heir sued as such, shall no more be held to special bail than an executor (a).

Bail by heir.

(a) In what cases executors may be arrested, see 1. *Sid.* 63. *Comb.* 206. *Rep.* 716. 325. 1. *Mod.* 16. 1. *Balk.* 98. 1. *Term*

The King against Sims.

Cafe 845.

PER CURIAM. If one brought in, in contempt, deny all upon oath, he is of course discharged of the contempt; but if he has sworn himself, he may be prosecuted for perjury (a).

If contempt be sworn off, he is discharged of contempt.

(a) See 3. *Hawk. P. C.* 7th edit. ch. 23. § 2. and the cases cited note a.

HOLT

Easter Term, 13. Will. 3. In B. R.

Cafe 846.

Anonymous.

Master of ship
may retain for
freight.
Ante, p. 447.

HOLT, Chief Justice. A master of a ship may keep the goods till he be paid the freight; but if he once part with the possession of them, he cannot retake them.

* [512]

Cafe 847.

* Anonymous.

Party oppressed,
good witnesses in
an indictment
for it.

HOLT, Chief Justice. In an indictment for oppression, battery, &c the party oppressed may be a witness (a).

And a justice of peace's clerk may commit an extortion.

(a) See Rex v. Maccarty, Salk. 286. qui tam v. Bunn, 4. Burr. 2257. Rex v. Rex v. Nunez, 2. Stra. 1043. Rex Moise, 1. Stra. 595. Anonymous, 7. Mod. v. Ellis, 1104. Rex v. Bray, Abraham 119. and 4. Hawk. P.C. ch. 45. §. 114, &c.

Cafe 848.

Anonymous.

Warranty colla-
teral was for the
security of pur-
chasers.

HOLT, Chief Justice. The true reason of collateral warranty was the security of purchasers, and for their encouragement; as also for the establishing and settling the estates of such as were in by title, or descent cast; and this was the only security such persons could have at common law (a). And because the estates of such persons as are in by title are much favoured in law, these covenants that were for strengthening of them were favoured likewise. And in those days there was no need of a lineal warranty; but, however, the force of that is taken away by the statute *de Donis*. And common recovery is not upon the supposition of recompence in value, and never was within the statute; but always as much out of it as if it were so mentioned by express words. And this, he said, was my LORD HALE's opinion.

Common reco-
veries not with-
in the statute
de Donis.

(a) See Littleton, sect. 705. 707. 2. Black. Com. 391.

Cafe 849.

Mitchel against Harris.

On a submission
to the arbitration
of "A. so that
if he makes his
award on or
before such a
day, and if he
make no
award, then
to the umpi-
rage of such
person as A.
shall chuse;"

DEBT upon an award, setting forth a submission to the award of A. and B. provided they make their award by such a day; and, if they did not agree, to the umpirage of such as they should chuse: "nul award" pleaded. The replication confessed that there was no award, but that the arbitrators had chose an umpire on such a day, which appeared to be within the time allowed them to make their award in; and sets forth the umpirage and breach. The defendant rejoined, That they had not chose any umpire after the last day which was allowed them to make their award: to this a demurrer.

A. may nominate an umpire before the time allotted to him for making the award has expired.

And

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And it was objected, that it appeared the arbitrators had chose their umpire too soon, viz. within the last day allowed themselves for making their award as arbitrators; and such choice was void, for they could not chuse an umpire till their own authority were determined; for notwithstanding such choosing of an umpire, they might make an award after any time before the end of the time allowed them.

S. C. Salk. 71.
S. C. 1. Ld. Ray.
671.
Ante, 120.
2. Lev. 285.
2. S. und. 129.
Sayer, 221.
1. Mod. 15.
2. Term Rep.
644.

But it was answered, that by this submission the arbitrators had election to make an award, or to choose an umpire * by such a day, and that by chusing the umpire before the day they had determined their election, and given the authority to the umpire. * [513]

HOLT, *Chief Justice*, quoted the case of *Twisselden v. Travers (a)*, where the submission was to the award of two, "so that they made their award before *Midsummer*; and if they could not agree, to stand the umpirage of such as they should chuse, so as he made his umpirage before the said *Midsummer*;" and they chose an umpire, who made an umpirage before *Midsummer*, and held good; because by the naming an umpire, they had determined their authority and election. But if the submission had been "the award of *A.* and *B.* so that they made an award before *Midsummer*, and if they did not agree, *J. S.* should be umpire;" they do not agree, *J. S.* makes an umpirage before *Midsummer*, that umpirage is void.

Nota diversitatem.
Otherwise if a particular person be named in the submission.

Judgment *nisi* was given for the plaintiff.

(a) 1. Lev. 174. 1. Keb. 848. 935. 2. Keb. 15.

Calladay against Pilkington.

Case 850.

IT was doubted, whether a gaoler could detain a prisoner, discharged by the late statute for relief of poor prisoners, for his fees. It was said, that TREBY, *Chief Justice* of the common pleas, held he might; for the act being for giving away the right of the subject, it ought to be construed strictly.

An insolvent debt or ordered to be discharged cannot be detained for his fees.

HOLT, *Chief Justice*. Let an act of parliament be ever so charitable, yet if it give away the property of the subject, it ought not to be countenanced.

Anonymous.

Case 851.

HOLT, *Chief Justice*. It was resolved on solemn argument, in the case of *Smith v. Barnaby*, that if one by will devise a rent-charge to *A.* in tail, the remainder to *B.* in tail, and *A.* suffers a common recovery to the use of *J. S.* and his heirs, and dies without issue, the remainder is barred.

Remainder in tail of a rent-charge may be barred by recovery.

Anonymous.

Easter Term, 13. Will. 3. In B. R.

Case 852.

Anonymous.

Wrong recital **H**OLT, *Chief Justice*. In debt, if the original be recited to be *attachiut*. instead of *summonit*. yet we cannot reverse the judgment, because it is only a recital.
Salk 701. Cro. Eliz. 308. Cra. Jac. 108. Cro. Car. 91. 4. Mod. 246. and Brown v. Morgan, Fort. 341. Lockyer v. Chetwynd, Fort. 341.

Case 853.

Saunders's Case.

General issue should be pleaded, or colour be given.

* [514]

TRESPASS for entering into the plaintiff's house, and keeping the possession thereof for so long; defendant pleads that J. S. was seised in fee thereof, and he being so seised gave licence to the defendant to enter into and possess the * said house till he gave him notice to leave it; that thereupon he entered and kept the house for the time mentioned in the declaration, and had not any notice to leave it all the time; and a special demurrer, because the plea amounted to the general issue.

And *PER CURIAM*, He might have given this matter in evidence against all people, except J. S. but against him he must have pleaded it. So he should here either have pleaded the general issue, or given colour to the plaintiff.
Ante, p. 97.
101. 121. 376, 377.

Therefore judgment was given for the plaintiff.

Case 854.

The King against Russell.

Indictment.

RUSSELL was indicted for opening a letter sent by the post (a), and the caption was, that *per juratores jurat. pro domina rege extit indictam.* and quashed for that (b).

(a) See 9. Anne, c. 10. s. 40. and the case of Martin v. Ford, 3. Ter. Rep. 101. (b) But see 4. Hawk. P. C. 7th edit. ch. 25. s. 126.

Case 855.

Anonymous.

Indictment will not lie on a statute, directing a penalty to be recovered by bill, plaint, or information.

INDICTMENT upon the 35 Eliz. c. 1. for making cables of old stuff, concluding *contra formam stat.* generally. The penalty given by the statute is four times the value of the cables, "to be recovered by bill, plaint, or information."

And it was quashed *nisi* upon this exception, that the justices of peace have no jurisdiction given them by the statute, and the indictment was taken before them at their quarter-sessions (a).

(a) In Smith's Case in Trinity Term, 4. Queen Anne, it was so adjudged in a writ of error on an indictment upon the statute of Usury against the lender. — Not in the former edition. — And see upon this subject Rex v. Wright, 1. Burr. 543. Rex v. Robinson, 2. Burr. 799. Rex v. Boyall, 2. Burr. 822. Rex v. Davis,

Sayer, 133. Hartley v. Hooker, Cowp. 324. Rex v. Balme, Cowp. 648. Cates qui tam v. Knight, 3. Term Rep. 442. Rex v. Harris, 4. Term Rep. 202. Rex v. Sainsbury, 4. Term Rep. 451. 4. Hawk. P. C. ch. 25. s. 4. page 51. *nisi*. Rex v. Marriot, 1. Show. 402, *nisi*. S. C. 4. Mod. 145.

The

Easter Term, 13. Will. 3. In B. R.

The King against Lee.

Cafe 856;

LEAVE was moved for, to have AN INFORMATION filed against him for these words spoke of a justice of peace, "He is an old rogue for sending his warrant for me."

Words spoke of a justice of peace.

HOLT, Chief Justice. He deserves to be bound to his good behaviour; though it be not proper for that justice to do it, but rather to get one of his brothers to do it for him.

1. Roll. Abr. 56, 57.
2. Vent. 50. 858.

And leave was denied, THE COURT desiring them to go by way of indictment if they would.

Cro. Jac. 59.
1. And. 120.
1. Sid. 67.
1. Lev. 52.

Salk. 695. 1. Mod. 26. 7. Mod. 107. 1. Stra. 517. 2. Ld. Ray, 1396. 3. Will. 177. 1. Brown's Cases Parl. 97. 6. Mod. 200.

Anonymous.

Cafe 857.

PER HOLT, Chief Justice, at Guildhall. Every factor of common right is to sell for ready money. But if he be a factor in a sort of dealing or trade where the usage is, for factors to sell on trust, there, if he sell to a person of good credit at that time, and be afterwards becomes insolvent, the factor * is discharged; but otherwise if it be to a man notoriously discredited at the time of the sale. But if there be no such usage, and he, upon the general authority to sell, sells upon trust, let the vendee be ever so able, the factor is only chargeable; for in that case, the factor having gone beyond his authority, there is no contract created between the vendee and the factor's principal (a); and such sale is a conversion in the factor; and if it be not in market-overt, no property is thereby altered, but trover will also lie against vendee: so likewise if it be in a market-overt, and the vendee knows the factor to sell as factor.

Factor of common right is to sell for ready money, unless the usage be otherwise.

* [515]

Stra. 1178. 1182.
5. Term Rep. 606.

(a) See Scrimshire v. Alderton, 2. Stra. 107. Drinkwater v. Goodwin, Cowp. 1182. Wright v. Campbell, 4. Burr. 251. Walker v. Birch, 6. Term Rep. 2046. Gonfales v. Sladen, Bull. N. P. 261.
120. Escot v. Milward, Espin. Dig.

Anonymous.

Cafe 858.

IN CASE, for a false return to a *mandamus* for restoring to an office in the corporation of *Orford*, which having influence on election of parliament-men, the two factions of *WHIG* and *TORY* were deeply engaged in it, and the whole county divided in it; and the action being laid in *Suffolk*, it was moved at the Bar to have it laid in another county, to preserve the peace and quiet of *Suffolk*.

An action for the false return of a *mandamus* is local, and must be laid, at the election of the plaintiff, in the county where the return was made, or in the county where the Court sits in which it is recorded.

PER CURIAM. It is a good cause to change a *venue* to preserve the peace of the county; but this action being a local one must in its nature be brought either in *Suffolk*, where the false return was made, or in *Middlesex*, where it appeared on record; and the plaintiff has his election, by law, of the two counties; and the

S. C. Salk. 669. Ante, 399. 408.

Court

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ANONYMOUS. Court cannot lay it, without his consent (*a*), in either of the two counties; for it consists of two falsities, of the fact, and the falsity of returning it on record (*b*).

ANTE, 121. 401. IT WAS AGREED, that in transitory actions the plaintiff has not a peremptory election, but the defendant might transfer it to the right county, unless the plaintiff would be bound by rule to give material evidence of some fact in the county where he laid it. And my Lord Shaftesbury's Case (*c*) was strongly urged, where, because of his great interest in London, an action of *scandalum magnatum* laid by him there was removed.

HOLT, Chief Justice, said. that was a case of the times, and when things were in a great ferment; and I do not know that that case was founded on law and reason; for in case of *scandalum magnatum* it was always ruled the *venue* could not be changed (*d*).

(*a*) Howarth v. Willet, 2. Stra. 1180.
Southhouse v. Boak, 2. Stra. 1215.
Nichols v. Bolster, 1. Will. 138. Slaughter v. Braddock, 4. Burr. 2447. Petit v. Berkley, Comp. 519.
(*b*) But see Poole v. Bennett, Stra. 374. Mylock v. Saladine, 1. Black. Rep. 480. S. C. 3. Burr. 1564. Mayor of Bristol's Case, 1. Will. 77. Rex v. Harris, 3. Burr. 1330.

(*c*) Shaftesbury v. Craddock, 2. Jones, 192. S. C. 1. Vent. 363. S. C. Skin. 40. S. C. 2. Show. 197.
(*d*) See Lady Falconbridge v. Ferrest, Stra. 807. Duke of Norfolk v. Alderton, Salk 668. 1. Lev 56. Carth. 400. Lord Griffin v. Buckley, Barnes, 482. Gilb. C. P. 90.

* [516]

Case 859.

* The King against Pigot.

INDICTMENT for attempting forcibly to carry away a woman of fortune. **PIGOT** was convicted upon an indictment for a *misdemeanor*, in attempting forcibly to carry away one *Mrs. Hescott*, a woman of great fortune.

HOLT, Chief Justice. Surely this concerns all the people in *England* that would dispose of their children well.

And he was fined two hundred marks, and the lady's maid, who was privy to the contrivance, was fined twenty marks, and to go to all the courts with a paper upon her, with her offence written in large characters.

Case 860.

The King against Brown.

JUSTICES on view of forcible detainer cannot restore possession. **HOLT, Chief Justice.** Justices of peace, upon their view of a force, cannot meddle with the possession; but all they can do is to remove the force, and commit them that use it, and to make a record thereof. **ANTE, 495.** Dyer, 187. 1. Sid. 156. 1. Vent. 303. 9. Co. 118. 2. Hawk. P. C. ch. 64. f. 50.

RECORD of commitment should be in the present tense. And here the record of the commitment was "*arrestavi*" in the preterperfect tense, and not in the present tense, as it ought to be, and all records of commitment are; as *committitur marescallo* in this court.

And the record was quashed, *nisi*.

Anonymous.

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Anonymous.

Cafe 861.

THE way upon taking assignment of bail-bond is to indorse a promise upon it to save the sheriff harmless against amerciaments ; and yet the bond continues still in the sheriff's custody (a).

Assignment of bail-bond. Ante, 447.

(a) But see now 4. & 5. Anne, c. 16. f. 20. and Tidd's Pract. 155. Sellon's Pract. 183.

Anonymous.

Cafe 862.

HOLT, Chief Justice. We may order an attorney of the court to deliver papers which are not his to the owner (a).

Attorney ordered to deliver up papers.

(a) See Mr. Dottin's Cafe, 1. Stra. Sir Richard Hughes v. Mayre, 3. Term 547. Strong v. Howe, 8. Mod. 339. Rep. 275.

The King against Ward.

Cafe 863.

WARD was indicted for barrettry, in which case the defendant ought to have a copy of the articles to be insisted on against him at the trial beforehand, that he may have an opportunity of preparing a defence.

On indictment for barrettry, the defendant must have a copy of the articles.

5. Mod. 18. 1. Ld. Ray, 490. 2. Atk. 340. 2. Hawk. P. C. ch. 81. f. 13.

AND HERE a notice left with the defendant's servant was adjudged ill ; and a trial without due notice ought not to stand.

Notice of trial left with the defendant's servant bad.—Tidd's Pract. 487. 1. Sellon Pract. 405.

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AND when there is a rule to give a copy of articles, and that is not done, the prosecutor ought not to be admitted at the trial to give any evidence, and then the defendant is of course acquitted.

Where rule is made to give copies, and that not complied with, prosecutor

shall not give any evidence.

Anonymous.

Cafe 864.

UPON an usurious contract pleaded, the proof lies all upon the defendant, for by his plea he confessed the debt. *Per* **HOLT, Chief Justice.**

In usurious contract, the proof lies on defendant.

See 2. Hawk. P. C. ch. 82. page 386, 387.

Spurraway against Rogers (a).

Cafe 865.

CASE upon a special promise to account. The plaintiff gave goods to such a value and a sum of money to the defendant, being master of a ship then bound for *India*, who promised to bring the value of them home in *India* goods.

Cafe will lie on special promise to account, but upon general delivery of goods

account only will lie.—S. C. ante, 501.

(a) This was at *nisi prius*, before **HOLT, Chief Justice.**

HOLT,

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SPURRAWAY
against
ROGERS.

HOLT, *Chief Justice*. If *A.* take goods from *B.* to account for them, if they come to account, though *A.* gives no true account, yet if *B.* has agreed to it, it is well. And if one receive goods of another, and expressly promise to be accountable for them, or to give an account of them, case will lie, if he will not account upon that promise; but upon a general bailment of goods, without a particular promise to account, there the sole remedy is by account. And if one covenant or promise specially upon receipt of goods to be accountable for them, if he will not account, action upon the covenant or promise will lie; and an action of account lies upon the general receipt.

Cafe 866.

Anonymous.

Bill of exchange
taken in pay-
ment good, un-
less vendee
knew it was a
bad one.
Post. 521.

HOLT, *Chief Justice*. If *A.* buy anything of *B.* and give him a goldsmith's bill in payment, which the vendor accepts without exception, if the goldsmith were worth nothing, and *A.* not know it, it is a good payment; *secus* if *A.* knew him to be in a failing condition (*a*).

(*a*) But see 3. & 4. *Ann*, c. 9. Bank of England v. Newman, 1. Ld. Ray. 442. Hankey v. Trotman, 1. Black. Rep. Taffell v. Lewis, 1. Ld. Ray. 744. Moor v. Warren, 1. Stra. 415. Timmer v. Mead, 1. Stra. 416. Manwaring v. Harrison, 1. Stra. 508. Hayward v. Bank of England, 1. Stra. 550. Hoare

v. Da Costa, 2. Stra. 910. East India Company v. Chitty, 2. Stra. 1175. Fletcher v. Sandys, 2. Stra. 1248. Metcalfe v. Hall, Bull. N. P. 275. Appleton v. Swestapple, Bayley on Bills, 73. Tindal v. Brown, 1. Term Rep. 107. and Kyd on Bills, 41 to 46. *contra*.

Cafe 867.

The King against Hill.

A master of a
grammar-school
must be licensed
by the ordinary.

A WRIT of *excommunicato capiendo* issued out against him, and the *significavit* on which it was grounded, and which was recited in the writ, alledged the cause of excommunication to have been for non-payment of costs assessed against him in the spiritual court, in *quodam negotio educationis et instructionis puerorum* without licence, without shewing what kind of education or instruction it was.

* [518]

And * here it was doubted, whether teaching even a grammar-school without licence were punishable in the spiritual court, especially since 14. *Car.* 2. c. 4. and other statutes inflicting the penalty of forty shillings a month on such offenders, whereby it is now made a temporal offence. *Vide* 3. *Keb.* 835.

HOLT, *Chief Justice*. If there were a canon prohibitory of this matter before the 25. *Hen.* 8. c. 19. it is now confirmed by that statute; and there is a CANON of *Queen Elizabeth*, "*De Ludi-magistris*;" and without doubt school-masters are in a great measure intrusted with the instruction of youth in principles, and therefore it is necessary they should be of sound doctrine, and in order thereunto subject to the regulation of the ordinary. But prohibitions

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prohibitions have deservedly gone to stop proceedings for teaching school without licence, because it is a point never yet determined (a).

THE KING
againſt
HILL.

But THE MAIN POINT gone upon was, Whether there were a recital in a cause good enough expreſſed in the writ to give them jurisdiction of ſignificavit on a the defendant, in the ſuit in which he was condemned. writ of excom- municato capiendō,

And it was urged, that the jurisdiction they would ſet up in a cauſa educationis et inſtructionis puerorum was abſurd, without mentioning the ſpecies of education and inſtruction; for this might be in dancing, fencing, or teaching a trade, muſic, navigation, &c. ; that the party was excommunicated for non-payment of coſts, ſo that though a jurisdiction be granted them over ſchool-maſters, yet there is no colour for ſuch a general jurisdiction: and though it may be objected, the Court will give credit to them, yet that is only aſſeſſed in the ſpiritual court in ſuæddam negotio educationis et inſtructionis puerorum ſive aliquâ licentiâ is ſo uncertain that the court of king's bench will quaſh the writ.

And ſo IT WAS RESOLVED by THE COURT; for a *capias excommunicat.* was not returnable before 5. Eliz. c. 23. which directs it to be made returnable in this court; and that the delivery of it to the ſheriff be entered on the roll here; and the making it returnable is what gives us jurisdiction; and this muſt be in all caſes of *excommunicato capiendō*; for there are nine cauſes in which there ought to go an *alias* and *pluries*; and the party, if he do not come in within ſix days after proclamation thereon, is to forfeit ten pounds the firſt time, twenty pounds the ſecond, and ſo on. And that the Court may know whether it be for any of theſe nine cauſes, the cauſe ought to be ſet forth in certain; and it was the deſign of the ſtatute that the cauſe ſhould be ſet out in the writ; and the writ did uſe to recite the cauſe even before the ſtatute; and then, if the cauſe * expreſſed were inſufficient, the way was to go to chancery, and to have a *ſuperſedeas* of the *capias excommunicato*; but that cannot be done now, the writ being returnable here; and they have nothing to do to ſuperſede a writ returnable into another court. *Vide N. B.* 64. *E.* 8. *Co. Trollop's Caſe*, 58. So that now this Court are ſole judges of the writ and the ſufficiency thereof ſince the ſtatute. And if the writ does not ſhew a good cauſe, we have no power to proceed upon it; and therefore if the cauſe be uncertain, as here it is, it ought to be quaſhed.

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Before the ſtatute might apply for *ſuperſedeas* in chancery; now it is returnable in the king's bench; if not good it muſt be quaſhed there,

And HOLT, *Chief Juſtice*, ſaid, he had acquainted the biſhops with the matter, wiſhed them to be more concile in their *ſignificavits*, or elſe they could not have the aid of this court.

(a) But it is now decided, that maſters of grammar-ſchools muſt be licenſed by the ordinary, who may examine the party applying for ſuch licence as to his learning, morality, and religion, *Rex v. Archbiſhop of York*, 6. Term Rep. 490. and, on a reaſonable doubt, may take time to enquire whether he is properly qualified,

in every reſpect, to be entrusted with the education of youth. *Rex v. Biſhop of Litchfield*, 7. Mod. 217. S. C. 2. Stra. 1023.; and as the teaching at ſuch a ſchool without a licence is a temporal offence, the ſpiritual court has no jurisdiction, *Jones v. Gegg*, 7. Mod. 374.

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THE KING
against
HILL.

ET PER CURIAM, The writ was quashed, and a *superfedeas* awarded.

Cafe 868.

Anonymous.

Ante, 493.
Entering judgment.

HOLT, Chief Justice. Every judgment entered before the effoin-day of a Term is of the precedent Term; but if entered after the effoin commenced, it is of the present Term.

Cafe 869.

The Case of the Farmers of Hampstead Water.

Quere, In trespass with a continuando, whether, on executing a writ of enquiry, evidence may be given of damages accruing from the same cause after the time laid in the declaration.

UPON the executing a writ of enquiry of damages in trespass, for digging a hole in the plaintiff's soil, whereby his land was overflowed, *continuando transgressionem* for nine months; and it was insisted, that they might give evidence of a consequential damage after the nine months, as well as in a nuisance which continues for nine months, and the cause is removed, if the effect continues afterwards, damage may be recovered for it.

But **HOLT, Chief Justice**, said, he was not satisfied that the parity would hold, for the *git* of the action in a nuisance is the damage; and therefore as long as there are damages there is ground for an action; but trespass is one entire act, and the very tort is the *git* of the action; and therefore he said he doubted, whether an action would lie for the continuance of a trespass as for that of a nuisance.

NOTE, In writs of enquiry the jury set their hands and seals to their verdict.

Cafe 870.

Lord Petre against Heneage (a).

An inventory made by an executor, and found among his papers, is evidence of assets.

1. Stra. 95. 401.
1. Will. 170.
Bull. N. P. 248.

TROVER by the plaintiff, as administrator *cum testamento annexo* of the late *Lord Petre*, against the wife of the first executor, for a necklace of pearl, said to have been in the * family for many generations, and worn as a personal ornament by *Lady Petre* for the time being, or for default of such by the lady-dowager *pro tempore*.

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To prove the property, an antient inventory made by the defendant's husband, being executor of *Lord Petre*, now intestate, being found among the antient evidences of the family, was allowed; for the mentioning this necklace in it shews he did not claim it in his own right; and none but a madman will inventory more assets than he has; and though, if the question were, Whether *Lord Petre* were proprietor or not? he himself could not be witness, yet the executor, by inventorying it, has charged himself with it as assets, and there it shall be taken as such.

(a) This case was at *nisi prius*, before **HOLT, Chief Justice**.

An

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And here, by **HOLT, Chief Justice, FIRST**, The wearing of a pearl is a conversion (a). Wearing a jewel is a conversion of it.

SECONDLY, Goods in grofs cannot be an heir-loom, but they must be things fixed to the freehold, as old benches, tables, &c. (b). What may be heir looms.

THIRDLY, A chattel in grofs cannot be devised for life, but one may devise the use of a chattel in grofs for life. How a chattel may be devised.

Plow. 525. 519, 520. Cro. Car. 346. 1. Bul. 192.

FOURTHLY, If one, before administration taken out, give away the goods of the intestate, and afterwards take out administration, he may avoid the gift. Administrator may recall a gift.

And, **FIFTHLY**, The jury cannot carry any evidence from the Bar without consent of both sides, except writings under hand and seal (c). A jury cannot carry evidence from the Bar.

(a) See *Richardson v. Atkinson*, 1. Stra. 576. *Hartop v. Hoare*, 2. Stra. 1187. *Rofs v. Johnston*, 5. Burr. 2825. *Seyds v. Hay*, 4. Term Rep. 260.

(b) As chimney-pieces, pumps, and the like, 2. Black. Com. 428.; but then articles of this kind are only considered as permanent on questions concerning them betwixt heir and executor, 1. H. Bl. Rep. 258.; for as between landlord

and tenant it is now held, that a tenant may, during his term, take away chimney-pieces or wainscot which he has put up, 1. Atk. 477.; and it has been determined, that a fire engine erected by a tenant for life shall go to his executor, 3. Atk. 13.

(c) See 2. Roll. Abr. 676 686. Cro. Eliz. 411. 616. Co. Lit. 227.

Tidd's Pract. 585.

The King against Crofs.

Case 871.

SHE was indicted for a *misdemeanor* in receiving stolen goods, knowing them to be stolen; and the very thief was produced as an evidence (a), who confessed the fact, he being brought up by *babeas corpus ad testificandum* from the Compter. A principal felon may be witness against the accessory.

HOLT, Chief Justice. These indictments were never thought good by me before I came upon the Bench, though I have been over-ruled in it once; but let us try the fact first, and it shall be considered afterwards whether the indictment be maintainable. And he said, some Judges would try a trover for goods before an indictment for the taking; but he never would do it, but rather get a juror withdrawn, if the matter had proceeded so far, that the plaintiff might not be nonsuited (a). A misdemeanor at common law is merged in a felony by statute. S. C. post. 634. S. C. 3. Salk. 193. S. C. 1. Ld. Ray. 711.

And the plaintiff in this action was bound in a recognizance to prosecute the principal felon in forty pounds in court.

(a) See the statute 22. Geo. 3. c. 58. and the case of *William Haslam*, Cases in Crown Law, 325.

(b) This was on a motion to arrest the judgment: the objection was, that the statute 3. Will. & Mary, c. 9. f. 4. having made the knowingly receiving of stolen goods felony, the offender could not be indicted for the *misdemeanor*; and the Court, after consideration, arrested the

judgment for this reason, S. C. 1. Ld. Ray. 712. But by 1. Anne, c. 9. f. 1. the receiver may be indicted for the *misdemeanor*, though the principal be not convicted; and by 5. Anne, c. 31. f. 6. if the principal cannot be taken. See 2. Ld. Ray. 1370. 8. Mod. 264. Cases in C. L. 98. Foster's C. L. 374. 5. Term Rep. 83. 4. Hawk. P. C. 7th edit. ch. 29. f. 43, 44.

Case 872.

* Key against Gordon.

Handwriting of a person abroad evidence. **I**NDEBITATUS ASSUMPSIT by an under-officer against his colonel for his pay.

AND HERE proof was admitted of the hand of a person proved beyond sea.

Indebitatus the proper action for money received to another's use. Postea, Hil. 13. Will. 3. Waldegrave's Case.

HOLT, Chief Justice. If one receive money to the use of another, an *indebitatus* is a proper remedy for it; but if in this case there were any legal deduction to be made by THE COLONEL, the remedy had been *account*; for where one receives money, and has no way to discharge himself of it but payment over, an *indebitatus* will lie.

Case 873.

Anonymous.

Sale of goods in the Strand does not alter the property. **T**ROVER was brought of a silver cup against a goldsmith in the Strand, and it appeared that his apprentice had bought it in the shop.

5 Co. 83.
2. Inst. 713.

And PER OMNES, A sale of goods in a shop in the Strand, or elsewhere out of London (a), does not alter the property;

Property not changed.

Nor, per **HOLT, Chief Justice**, Even in London, if the felon be convicted upon the owner's evidence (b).

A demand on an apprentice not sufficient in TROVER.

But because he could not prove a demand of the master, but only of the apprentice, he was nonsuited.

(a) The reason why it alters the property in London is, because a sale in a shop there is in market overt. NOTE to the former edition.—But in London every shop in which goods are publicly exposed

to sale is market overt for such things only as the owner professes to deal in, 2. Bl. Com. 449.

(b) Bacon's Use of Law, 158. 2. Bl. Com. 449.—But see 2. Term Rep. 759.

Case 874.

Ward against Sir Peter Evans.

Note does not discharge the debt till paid, if there be no default.

S. C. 2. Ld. Ray. 528.
S. C. Comy. Rep. 138.

S. C. 2. Salk. 442.
S. C. 6. Mod. 36.

S. C. 3. Salk. 118.
S. C. Holt, 120.

HOLT, Chief Justice. If A. owe B. money, and give him a goldsmith's note in payment, the debt is not discharged till B. receives the money, if there be not default in him that it was not paid, or if he do not, at the receipt of the note, give an acquittance for the debt to A. (a). But if B. had an election to receive the money or a goldsmith's note, and he chose the note, it may be otherwise; and more especially if he give up his former security that he had for the original debt.

If A. and B. be two goldsmiths, and B. give a note to C. for one hundred pounds, A. gets possession of it, and brings it to B. and takes a new note for it, giving up his former, it is no payment.

(a) See Anonymous, ante, 509, 510. and the cases there cited.

Anonymous.

Anonymous.

Case 875.

IN CHANCERY it was agreed to be the constant practice of the Court, that if there be covenants to purchase an estate to such and such uses, and money lodged in trustees for * that purpose, the Court will compel a purchase to be made to the uses, though the covenantor died before; but if the first estate is an entail, with remainders over, and the person to take it be living at the time of the death of him whose money it is, there chancery shall not compel a purchase for the sake of the remainder, because tenant in tail may destroy it as soon as it is created; and the Court will not do a vain thing. If a man covenant to purchase for him and the heirs of his body by such a woman, the remainder to his own right heirs, and he dies without issue, and without making any purchase, the Court will not compel the executor to make a purchase for the heir, because that attached in himself, and is extinguished in him.

Chancery will not compel a purchase for the benefit of a remainder, or an estate tail.

Anonymous.

Case 876.

IF LEGATEE bring bill against an executor for discovery of assets, it is no objection that he has not made the other legatees parties (a):

Legatee may bring bill for discovery of assets, without making the other legatees parties.

(a) See Mitford's Pleadings, 39. 144. 220.

TRINITY TERM,

The Thirteenth of William the Third

IN

The King's Bench.

Sir John Holt, Knt. Chief Justice.

Sir John Turton, Knt.

Sir Littleton Powys, Knt.

Sir Henry Gould, Knt.

} *Justices.*

Edward Northey, Esq. Attorney General.

Sir John Hawles, Knt. Solicitor General.

Case 877.

Anonymous.

Time of pleading in abatement.

Ante, 504.

Skin. 2.

2. *Mod.* 218.

Tidd's Pract.

240.

* [523] **P**ER CURIAM. If one will plead in abatement, he must do it before the rules are out, and shall not have till effoins of next Term for it ; and formerly the course was, to give rules for pleading generally, and after they were out to serve rules peremptory. If declaration be delivered before *craft. Animarum* or *mensum Pasch.* the defendant has not time till next Term to plead in abatement, but only till the rules are out ; but if it be * delivered after that time, the defendant has till the effoin-day of the next Term to plead in abatement.

Case 878.

Anonymous.

No costs on judgment in plea in abatement.

HOLT, *Chief Justice.* The late statute, 8. & 9. *Will.* 3. c. 11. giving the defendant costs, does not extend to judgment for him upon demurrer to a plea in abatement.

Ante, 195. *Thason v. Lloyd*, *Salk.* 194. *S. C. Ld. Ray.* 336. *Comb.* 482. *Garland v. Extend*, 6. *Mod.* 38. *Post.* 609. 6. *Mod.* 38. 2. *Ld. Ray.* 992. *Miller v. Samgrave*, *Hullock on Costs*, 150. *Astley v. Young*, 2. *Burr.* 123.

Anonymous.

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Anonymous.

Case 879.

WRIT OF ERROR was to remove a record "*coram J. N. milit. J. P. milit. et Jo. Bl. milit. Just. nostr. de banco*," and *placita* returned were "*coram G. TREBY, Chief Justice, &c. et sociis*." Writ of error varying from the record does not remove it.

And it was moved to quash the writ for variance.

B. R. H. 131.
1. Term Rep. 240.

HOLT, *Chief Justice*. The plaintiff's attorney might have sued execution notwithstanding this writ, for it was no authority to remove the record.

And the writ was quashed *nisi*.

Bidolph *against* Veal.

Case 880.

WRIT OF ERROR from the court of *Ely*, of a judgment in trespass. The record certified set forth a summons such a day, returnable the same day generally; and a return the same day of a *summoneri*; and thereupon an attachment, and a return the same day of a *nil*, and then a *capias* returnable the same day; and thereupon the defendant brought in in custody, declaration, plea, demurrer and judgment, writ of enquiry executed and returned, and judgment final, all in a day. *Capias* made returnable the same day the summons was returnable is error.

Bar. K. B. 409.
2. Will. 117.
3. Will. 454.
Black Rep. 918.
1. H. Bl. Rep. 297.
Seldon's Pract. 90. 226, 227.

And this was insisted for error, that the summons being made returnable generally such a day, the defendant had that whole day to appear; and then it was erroneous to compel his appearance by *capias* that day.

And that was agreed to by THE COURT; for though in counties palatine and grand sessions of *Wales* they split days and hours, and perhaps they might do the like here, yet having not done so, *viz.* made the process returnable at such an hour of the day, but generally at such a day, as here, it was erroneous to award a *capias* till the day was over; for the *capias* is for the contempt in not appearing at the return of the summons, and in contempt he could not be till after the time of the return.

SECONDLY, It was resolved, that the bare appearance upon the *capias* being compulsory, did not help this error, because it was what the defendant could not avoid.

THIRDLY, It was resolved, the omitting to take advantage of it then, but pleading over, cured it; for he might have demanded judgment whether he ought to be put to answer upon the * *capias*, the return of the *pone* being not yet out. • [524]

FOURTHLY, It was resolved, it was not necessary to have fifteen days return of process in a franchise; for the reason of them in the court of *Westminster* is, because that time is judged necessary for people to come from the remote parts, to which the process of those courts does extend; which does not hold in franchises. Not necessary to have fifteen days to the return of a process in a franchise.

M m 4

FIFTHLY,

Trinity Term, 13. Will. 3. In B. R.

BIDOLPH
against
VREAL.

FIFTHLY, The judgment was reversed for this error, viz. that the writ of error is executed the same day with the *pone's* return, and so might be before any *pone* issued out; and no appearance and pleading can help that.

Jud. reversed.

Case 881.

Fox *against* Thexton.

GERMS OF OAK. Of germs of oak growing not of a root, the tree whereof was twenty years old when cut, there shall be tithes paid; for oak or other timber cut under that age shall pay tithes as other underwood; but if the oak or other timber-tree was twenty years old when cut, it was not tithable, and for that the germs of the roots of such trees cut at that age shall pay no tithe.

2. Inst. 643.
1. Lev. 189.
1. Sid. 300.
Cro. Eliz. 1. 55.
Bunb. 98. 1. Roll. Abr. 640. 2. Leon. 79. 11. Co. 48. Cro. Jac. 100. Moor, 908. 3. Com. Dig. "Dimes" (H. 4.)

Case 882.

Slanney *against* Slanney.

Plea put in after rules for pleading were out, beginning in bar and concluding in abatement.

S. C. 1. Ld. Ray. 694.

DEBT UPON A BOND. A declaration was delivered before *menssem Pasch.* and a plea put in after the rules of pleading were out, beginning with *actio non*, and concluding in abatement. The doubt was, Whether this were not a discontinuance.

And it was said, the Books ran both ways; and agreed, if it be taken in abatement, it came too late, the rules being out. And the case of *Bisse v. Harcourt* (a) was quoted, where an attainer in disability of the person was pleaded thus; and the plaintiff replied, demanding judgment of damages, shewing that it was a discontinuance, matter of abatement being pleaded in bar; and said, if the plaintiff had pleaded matter of fact, answering a matter pleaded in abatement, a conclusion of a prayer of damages had been proper; but where he does not reply such a fact, he only ought to pray that his writ be adjudged good; for if upon trial of matter of fact pleaded in abatement, the issue be for the plaintiff, he shall have judgment final: and the case of *Medina v. Stanten* (b), here before was quoted.

HOLT, Chief Justice. Where the Court awards a *respondens ouster*, when the judgment ought to be final, it can do no harm, because the defendant cannot assign it for error, no more than he can the awarding an *essoin* when it ought not to have been, being for his advantage.

At another day he said, the defendant begins with an *actio non*, because the plaintiff is outlawed in the common pleas, and *pet. jud. de brevi*, which is a clear plea in abatement. And *Mo. 30.* was quoted, where it is held, that if the plea be for any matter appearing in the writ, it is proper to conclude with a *jud. de brevi*; but if for matter *ab extra* it may be so, or otherwise in abatement.

(a)

(b)

if

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if it be for any thing out of the writ, as jointenancy, or the like, the conclusion may be with a *judicium de brevi*, or otherwise in abatement: if one begin in abatement, and conclude to action, it is ill, if the plea be not sufficient in bar according to the conclusion; and if demurrer be to such plea in that case, judgment shall be against the defendant, for his conclusion affirms the writ good; but if the plea commence in bar with a good matter, and conclude to writ abatement, it will be well, for the plaintiff cannot have a good writ, if he has not a good cause of action. 36. Hen. 6. 18. And it was said, if in the principal case the plaintiff had demurred, or replied in bar, and the Court were of opinion that it was a plea in abatement, perhaps it would be a discontinuance.

SLANNET
against
SLANNET.
If begin in abatement, and conclusion to action, it is ill, if plea in bar be not sufficient.
If plea commence in bar with good matter, and conclude in abatement to the writ, it is well.

At last the rule was for the defendant to conclude his plea well, and then judgment should go according to the goodness of the matter; for if this be made in abatement, it is irregular after the rules are out. Therefore let defendant shew cause why he should not conclude in bar; for these irregularities in pleading should not be encouraged to inveigle the Court.

Anonymous.

Case 883.

HOLT, Chief Justice. Bail was excepted against in Vacation, and no other put in, nor bail justified till Term; and then the principal would surrender himself in discharge of the bail; and that he could not do, for bail can never surrender, nor the party come in by way of surrender, but at the return of a process, or when he is in court by his bail. If sheriff return a *cepi corpus* upon a *distringas*, principal may surrender himself, but bail excepted against is as no bail till changed or justified.

Bail can never surrender, or party come in by way of surrender, but at return of process, or when he is in court by bail.

Anonymous.

Case 884.

PER CURIAM. When it is moved to have submission to award made a rule of Court, there ought always to be an affidavit of notice, because the act gives the Court power to examine the justice of the award.

Notice should be of motion to make submission to award a rule of Court.

See Sellon's Practice, 2. vol. 343 to 356. Tidd's Practice, 540. 547.

* [526.]

* Maddox against ———.

Case 885.

A PROHIBITION was moved for to stay a suit in the court of admiralty brought by a surgeon of a ship for his wages; and the suggestion was, that all was paid to the master.

Suit in admiralty for surgeon's wages.

PER CURIAM. Payment to the master is not payment to the seamen, but the ship itself is liable for their wages; and they would hear Counsel.

Bunb. 121.

Berty

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Cafe 886.

Berty *against* Dormer.

Averring lands are deficient in value puts the proof on the pleader.

ISSUE directed out of chancery was, Whether land assigned for payment of a legacy were deficient in value; and issue was joined upon the deficiency, the one alledging that it was deficient, and the other that it was not.

PER CURIAM. Though averring that it was deficient is such an affirmative as implies a negative, yet it is such an affirmative as turns the proof on those that plead it. If he had joined the issue that the lands were not of value, and the other had averred that they were, the proof then had lain on the other side. If one plead *infra etatem*, which is no more than that he is not of age, and issue is thereupon, he that pleads the *infra etatem* must prove it.

HOLT, Chief Justice. The common way of apprising title herbage is two shillings in twenty.

And if one devise lands to the value of one hundred pounds a-year to another, it is *prima facie* the best rule of valuation to estimate them at the value they were at the death of the devisor.

Cafe 887.

Taylor *against* Brudon.

Non-suit for non-delivery of declaration. Sellon's Pract. 241.

HOLT, Chief Justice. Upon common bail filed, if one do not deliver declaration before the end of two Terms, he shall be nonsuited.

241. 2. Term Rep. 112. 3. Term Rep. 123. 5. Term Rep. 36. Tidd's Practice, 201.

Common bail. **SECONDLY,** If, upon examination before a Judge, one do not make out a good cause of action, common bail shall be ordered;

When a Judge's order should be final. **THIRDLY,** And if, upon examination before a Judge, common bail be ordered, and the plaintiff do not there declare that he will move the Court, or give notice of such his intent to the defendant, the Judge's rule shall be final to him.

Demand of a declaration. **FOURTHLY,** And if the plaintiff has several attorneys, a demand of a declaration of any of them is good. Tidd's Practice, 219. 221.

* [527]

* Anonymous,

Cafe 888.

HOLT, Chief Justice. The sheriff ought not to make a blank warrant, for the attorney to fill with a special bailiff. A blank warrant is bad. See *Burden v. Fern*, 2. Will. 47.

Acceptance of bail bond discharges the sheriff. **SECONDLY,** If the sheriff take insufficient bail, and the plaintiff's attorney accepts of an assignment of it, he thereby discharges the sheriff from amercements (a).

(a) See Tidd's Pract. 160. 165.

THIRDLY,

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THIRDLY, The sheriff upon assignment does not part with the possession of the bond (a), because if the plaintiff be non-suited, the sheriff must be indemnified; but he must produce it at the trial.

Formerly on assignment the bail bonds remained with the sheriff.
Ante, 516.
Ante, 447.

(a) But see 4. and 5. Ann, c. 16. s. 20. Tidd's Pract. 154.

Anonymous.

Cafe 889.

PER CURLAM. If one has several causes of action, each whereof is too small for special bail, he cannot join them to enforce special bail.

Several causes of action cannot be joined to have special bail.

Parker against Atfield.

Cafe 890.

DEBT upon a bond for twenty pounds against an executor, who pleads that the testator was indebted in one hundred pounds to J. S. *ultra quod* he had not assets. *Replication*, That the judgment was kept up by fraud, and the party to whom the judgment was, willing to take twelve shillings for it. *Rejoind*. That it was not by fraud, and that he had not assets but to the value of five pounds; and a demurrer,

If executor pleads a judgment generally, he confesses assets for so much, and cannot after say he has assets to a less value.

Because that when an executor pleads a judgment generally, he thereby confesses assets for so much, and afterwards he cannot come and say he has assets but to a less value.

S. C. 1. Salk. 311.
S. C. 1. Ld. Ray. 678.

HOLT, Chief Justice. The fair way for an executor is to plead the judgment, and shew how much is due upon it; and then to say that he has not assets but to so much; and that is the honest way of doing it: for if a judgment be pleaded in its full extent of the penalty thereof, and the plaintiff replies that there is but so much due, or that the party is willing to take so much, or that it is kept up by fraud, and issue is thereupon joined; if it be found by the jury that the executor has not wherewithal to satisfy it, he shall not be charged for more, because there he is not guilty of fraud. If there be three judgments of twenty pounds each, and the executor has assets only to the value of twenty pounds, and he pleads these three judgments, which in all amount to sixty pounds; if any one of them be ill pleaded, or issue be joined, and found that any of them is kept up by fraud, the executor has confessed assets for that judgment that is ill-pleaded; kept up by fraud, &c.; but if the plaintiff desire to have judgment when assets descend, and so admits * your plea to be true, then the question is, whether the executor, having but twenty pounds in hand, and forty pounds come to him, being just enough to satisfy the three judgments pleaded, he shall not be liable to the plaintiff's execution, who took judgment to execute when assets came? And he shall not; for he has pleaded those judgments, and the plaintiff demands judgment to execute when assets came

Executor in pleading a judgment, should say how much is due on it.

* [528]

If executor pleads judgment, which is ill-pleaded, or on issue found to be kept up by fraud, he has confessed assets for it.

If on judgments pleaded, plaintiff prays judgment when assets come, he shall not be chargeable till those are paid.

after

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PARKER
against
ATFIELD.

after the judgments pleaded were satisfied; and he quoted *Pastb.* 23. Car. 2. Rot. 339. *Walpole v. Prettiman*. Upon a *sci. fa.* upon such a judgment to have execution, the defendant's executor pleaded, that he had not assets over and above what would satisfy the former judgments pleaded; and held a good plea: but if he plead any of the judgments ill, or that it be found against him upon issue tried, that any of them is kept up by fraud, he shall not then have the allowance of being free of such a judgment till assets descend to the value of the other judgments, and more so, that there is no mischief to the executor, let him but plead well and honestly; and to hold them to this, is the way to make executors honest, and to reduce matters into certainty. But if he had no assets at all, his best way had been to plead the judgment, specialties in their order; but he must take care to plead them honestly, for if any one of them be false, he is gone for all; so that if there be a mistake in the pleading, or fraud, it is a devastation, if issue be taken upon the fraud, and it is found; but if you are not found to have assets for the whole judgment, it shall not be intended you have more than you confessed, for the fraud is the only thing traversable.

Fraud is traversable.

And GOULD, Justice, quoted the case of *Veal v. Gileston* (a), and *Workhouse v. Simon* (b), that issue must be joined upon the fraud; for if you reply a composition made, and that yet the judgment is continued by fraud; still it is the fraud that is traversable. And if one plead ten judgments, and one of them be by fraud, he has confessed assets at least to the full value of that judgment: and he said it had been held in the common pleas, that a traverse in the composition had been well; but a writ of error brought, and the judgment reversed here, for the fraud only is traversable.

a. Saund. 50.
contra.

Judgment was given for the plaintiff.

* [529] (a) *Veal v. Gileston*, 1. Jones, 91. (b) 3. Keb. 162. 418. 455. 460. 506 577. 607

Case 891.

* Anonymous (a).

An imparlance. *Salvis sibi omnibus exceptionibus* can only be granted by the Court, and after that the defendant may plead in abatement to the writ or count, or to the jurisdiction.

Vide Vent. 184. Hard. 365. 1. Lut. 46.

4. Bac. Abr. 29. 47. 3. Black. Com. 301. 6. Mod. 28. 10. Mod. 127. Tidd's Pract. 240. 5. Mod. 335. Selton's Pract. 292.

ONE came to the prothonotary for an imparlance generally, and having got it entered thus, "*salvis sibi omnibus exceptionibus et advantagiis tam ad jurisdictionem cur. quam, &c.*" and afterwards would plead to the jurisdiction of the Court.

POWELL, Justice. There are two sorts of imparlances; the one general, after which one cannot plead in abatement at all; the other special, with a "*salvis sibi omnibus exceptionibus tam ad breve quam ad narr.*" after which one may plead in abatement of the writ and count; and this sort of special imparlance may be granted by the prothonotary. There is another sort of an imparlance more special, with a "*salvis sibi omnibus exceptionibus et advantagiis quibuscunque,*" which cannot be granted without

(a) This case was in the court of common pleas.

leave

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leave of the Court (a), and is discretionary; and after which one ANONYMOUS may plead to the jurisdiction of the Court.

And a *respondens auster* was awarded, and it was ordered to be entered for reason, on the roll specially, that it was obtained without leave of Court.

(a) *Grant v. Lord Sondes*, 2. Black. Rep. 1094. *Brewster v. Capper*, 1. Black. Rep. 51. 1. Will. 261.

Lancashire against Killingworth.

THE defendant covenanted with the plaintiff, that upon two days notice within a year, to be given at *Hudson's Bay House*, he would accept of one thousand pounds stock in such a Company, and would pay two thousand pounds at the transferring thereof. The declaration avers, that within the year, viz. such a day, he left notice in writing for K. the defendant, to come to *Hudson's Bay House* the fourth of November, which was also within the year, to accept the transfer; that the plaintiff was there on the same day ready, and did tender a transfer of the said stock to the defendant, but that the defendant did not come and accept it, or pay the two thousand pounds. Upon this declaration there was a demurrer.

The question is, Whether upon this declaration the plaintiff ought to have judgment for the defendant's not accepting the stock, or paying the money?

And HOLT, *Chief Justice*, who delivered the opinion of the Court, argued thus: It does appear that the money was to be paid upon transfer of the stock; and it is to be admitted, that when the money was to be paid upon the transferring of the * stock, or doing any other thing, if he that is to make the transfer, or do such other thing, make tender, and the other refuse, then he is as much intitled to the money, as if the transfer, or other thing, had been actually done; for though the words be, *that the money shall be paid upon the transfer*, yet if the party does all that lies in him, he is thereupon as much intitled to the money, as if he had done all effectually.

But the question will be, Whether there be a sufficient tender here? And we all hold that there is not, but that it is defective, and therefore the plaintiff cannot recover: he avers that he was ready, and did at the time and place appointed offer to make a transfer, but the defendant did not accept it; and in this is the fault of his declaration. Suppose the defendant had been there, and he had tendered it to him, and the other refused, he ought to have averred the tender and refusal; and in that case, to aver a tender without averring a refusal likewise, would not do. 16. *El.* 31. 17. *Ed.* 3. 11. That pleading of tender with omission of refusal is not good, and so are many new Books. 1. *Sid.* 13. Action upon a promise, that the defendant, in consideration that the plaintiff would pay him a certain sum of money, promised to assign him

Case 892.

Tender must be alleged the last convenient time of the day. S. O. 2. Salk. 623. S. C. 3. Salk. 342. S. C. 1. Ld. Ray. 686. S. C. Comy. Rep. 116. Postea, p. 531. Say. Rep. 189.

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Postea, p. 531. If tender is made to the defendant, and he refuses, that refusal should be averred, else it is ill on demurrer, but helped by a term; verdict.

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LANCASHIRE ^{against} KILLING- WORTH. a term; and the plaintiff averred a tender of the money, but that the defendant did not assign; and after verdict it was moved in arrest of judgment, that the plaintiff did not intitle himself to an action, for that he did not aver a refusal, though he had averred a tender; but it was there adjudged well after verdict, but also held that it would be bad on demurrer. And upon this diversity is the case in 2. *Saund.* 350. which I remember very well in this court: it was an agreement by one to build a house, and for that the other was to pay him so much money upon building of the house; and this averment was of a tender to build the house, but not that the other had refused to suffer him to build it; and all the Court were of opinion, that the tender without averment of a refusal was not good, but being after verdict it was held well. 2. *Vent.* 109. *Buckley v. Milnerd.*

• [53r]

If time and place be appointed for doing a thing, and the party to whom it is to be done, is not present, tender at the place the last convenient time must be al-
leged.

Then there is another way of pleading a tender, if time and place be appointed for the doing of the act. If the party that is to do it come, and he to whom it is to be done do not come, there he ought in his declaration to alledge that he was at the time and place, and tendered, but no body came to receive. *Rel.* 38. And if the party, to * whom the thing is to be done, be absent, there is this further considerable in averring a tender, that is, the time of day to make the tender: if there be time and place appointed, the party cannot come at any time of the day to make a tender; but in such case the law hath appointed the last time of the day on which the thing can be conveniently done, for the tender to be made; for it cannot be in the morning, nor at any time of the day, but the last time on which it may conveniently be done, and the party must stay till then. 5. *Co.* 114. *Wade's Case.* 2. *Cr.* 423. Exception was taken to a pleader of a tender on a day certain, because it was not said at what time of the day it was made, for he might have come and made tender at a time not fit or appointed by law, in the same day.

Postea, 532.
If refusal be averred, it is good evidence of a tender to the person, which would be good at any time of the day.

HOLT. If he had averred a refusal to accept, such refusal would be good evidence of a tender to his person, and that would have been good at any time of the day; and averring of such tender and refusal on the plaintiff's side would have been well, without telling on what time of the day the tender had been; because the averring a refusal implies the defendant's being present, who ought to accept it; but if the party were not present, it ought to be shewed that he did not come, and that you were there, and made tender on the time of the day on which the law appoints it to be done; and that is the last time of the day on which it may be done conveniently.

It was heretofore questioned, whether it should not be alledged, that neither the party himself, or any body for him, was at the place to receive; because if any body else had been there for him, it had been as well as if he himself had been there; and therefore antient precedents are, that neither he nor any body for him was there.

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there. But a tender being pleaded, and that he was not there ready to receive it, was held good, without saying, that no body else was there for him. 3. *Cr.* 734. 2. *Cr.* 13. *Yelv.* 38. For if any body had been there on his behalf, that ought to come of his side, and it shall not be intended if they do not shew it. And what is the reason of this? This is it: when a man has covenanted and agreed to do a thing, in excuse of himself, for not doing thereof according to agreement, he ought to shew that he has done his utmost endeavour to perform it, and shew how it came to pass that he did not, or could not do it. And here was an agreement by the plaintiff to transfer his stock; and hereupon the money was to be paid: the plaintiff indeed says he tendered the transfer, * and so shews he did whatever he could do towards the performance of his agreement; but that is not enough, for he ought likewise to shew how it came to pass that it was not performed; as that the defendant was there and refused to accept, or was not there at all, or on the last convenient time of the day which the law appoints for doing the matter. And all this the plaintiff ought to shew to intitle himself to this action.

Tenderpleaded, and that was not there to receive it, good, without saying, nor no one else for him.

* [532]

Where person agrees to do a thing, he must shew he has done all in his power to perform it.

Upon this reason of law is the case in 8. *Co.* 92. One makes a feoffment, upon condition that the feoffee should re-infeoff the feoffor; or one binds himself in a bond to infeoff obligee by such a day, and before the day the feoffee, or obligor, is disseised by him that was to be infeoffed, and then the bond is put in suit, it is not a good plea to say that you were always ready to infeoff him, but that he himself before the day ousted you; but you must proceed farther, and say, that he kept you out of the possession till after the day, with force; for though he had interrupted you, perhaps you might have come upon the land afterwards and performed the agreement, or make a tender, which if he refused would have been tantamount; for you ought not only to shew a disturbance by him, but also such continuance of that disturbance as made it impossible for you to perform on your side; and in that case he ought to shew, that he came to endeavour to make a feoffment, but could not do it by reason of the force he met with from the plaintiff; and that had been a good excuse: for if he, to whom a thing is to be done, hinder the other that is to do it ever so much; yet the other must use his utmost endeavour on his side to perform; and shew that he has done it, or else he forfeits his bond, or breaks his agreement. 3. *Cr.* 694. is a very remarkable case: The condition of a bond was, that before such a day the obligor would procure such a woman to marry the obligee; the obligee goes to her, and tells her, how barbarously he would use her if she married him, and called her "*whore*," and threatened to tie her to a post, and told her such things, that no woman in her senses would marry such a man; after the day, debt was brought upon the bond, and this matter specially pleaded in bar; and adjudged to be no good plea, but that, notwithstanding the menaces, the obligor ought to have shewed that he had done his utmost endeavour to procure her to marry him, but that she

by

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LANCASTER
against
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WORTH.

by reason of the menaces refused, and so he was hindered by the plaintiff.

* [533] *Hob. 177.* An award to enter into a bond to another, it is not enough for the party to bring a bond written, and to say *I will seal and deliver you this bond*; but he must bring the writing, with a seal clapped upon it, and say, *I deliver you this as my act and deed*; and if he omits the doing of any one thing that is essentially necessary to the executing a deed, he has not performed the award.

There is one thing of what I have said may be liable to exception, especially in a case of transferring a Company's stock, which is mentioned in the case of *Shales and Signoret*; this transfer was to have been made in the book of the *Hudson's-Bay Company*, and they have set hours on which their books are open; and to say that he was there to make transfer, and tendered it at a time which is the last convenient time of the day, might be in vain; because by the usage of the Company, the books are not then open, and therefore no transfer could be; and a tender, when no transfer could be, would be void.

Ans. If the agreement leaves it indefinite at such a day, the law knows no other time but the last convenient time of that day; but if a usage be averred, that the time for transferring is between such an hour and such an hour, there it ought to be averred, that he came within the ultimate convenient time by the usage, and that will be well; as if the usage be, that the books are open till six o'clock only; the proper time to come will be about five, and to stay till six.

And judgment for defendant PER TOTAM CURIAM.

Cafe 893.

Furlong against Thornigold.

DEBT UPON A BOND for the performance of an award; "an award" pleaded; the plaintiff sets forth part of the award, but not all, and concludes with a *profert*; the defendant craves *oyer*, and the award being set forth at large, demurs generally, for the variance between the award replied, and that set forth on the *oyer*; and *Smith v. Yeoman*, 1. *Saund.* 319. was quoted, where the plaintiff in such case ought not only to set forth the award, but (a) also to assign a breach.

Cro. Eliz. 861.
9C4.
2. Lev. 235.
2. Show. 61.
Kydon Awards,
192. 196.

* [534]

But it was objected, that it is enough to shew so much of the award, as to give himself cause of action, and to shew the award good, that is mutual; and if there be anything more in it, it ought to come of the defendant's side; as in case of an action upon an act of parliament. *Vide* 1. *Leo.* 72. In debt upon an award, nothing was set forth but the submission to the award of J. S. and that he awarded the defendant to pay the plaintiff ten pounds, and

(a) See *Foreland v. Marygold*, 1. *Salk.* 72. *S. C.* 1. *Ld. Ray.* 715. and *Perry v. Nicholson*, 1. *Burr.* 278.

held

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held the action did lie, and that the plaintiff is bound to shew no more than does for him, and the rest ought to come of the defendant's side. *Vide Lewis v. Scholastica* in *Plow.* that one need say no more than is for his purpose. *Palmer*, 511. that in order of good pleading, that when the defendant pleads *nullum fecerunt arbitrium*, and the plaintiff shews an award and breach, the defendant ought to rejoin *nullum tale fecerunt arbitrium*.

FURTHER
against
THORNHILL.

HOLT, *Chief Justice*. You set out too little or too much; for you do not set out the whole award, but you say *proferet*, as if you had set it out. But the question will be, Whether it will not be well on a general demurrer? 2. *Rich.* 3. 13. The issue is *non fecerunt hoc arbitrium*; but suppose part of the award be well, and another part void, and so bad that it avoids even the whole award, and the plaintiff sets out only the good part, *et nullum tale fecerunt arbitrium* be pleaded, and then the whole award is set out. 18. *Edw.* 4. 32. *Bro. Arbit.* 39. 41. But in those days they held an award void in part to be so in all; as award that there should be mutual releases for the purpose, and that one of the parties should get a third person to be security for the payment of ten pounds to the other, such award would have been held void *in toto* in those days; and so was the law held all along until *King James the First's* time, when, as appears in *Hobart* and *Hutton*, it was held an award might be good in part, and void in part. But here it was said, that the plaintiff ought to set forth all the things awarded to be done by him, though perhaps he need not set out everything to be done of the other side; and the omission hereof in the declaration, and setting it out in the other part, is a substantial variance. But if a void part of the award be omitted, so it be such a void part as does not avoid the whole award, that may be well enough; for where an award contains several matters to be done on the plaintiff's side, all which are well awarded, and to be performed by the plaintiff, and he only sets out enough to intitle himself to an action, and they come and plead "no award," and, upon *oyer* of the award, it appears the plaintiff was to do more than he set forth, and that those things were well awarded, that is, that the award was legal as to them; the question is, Whether he ought not to shew all those things that he was to perform, or if the omitting any of them be not a substantial variance? It was said, that in debt upon an award he need only set out * enough to intitle himself to action; but that he ought to shew so much of the award as was necessary to make it good.

Award may be
good in part,
and void in part.

If a void part of
an award be
omitted to be
set forth, it is
well.

* [535]

And HOLT, *Chief Justice*, seemed to approve of the case in 1. *Leo.* 72. *vid. Style*, 98. 1. *Sid.* 161. that debt lies upon an award, without setting it all out. But here the variance was held material.

And judgment was given for the defendant.

Case 894.

Wilbraham against Lownds.

Trespass in the king's bench, for trespass committed on lands in the county palatine of Cheshire. **T**RESPASS *quare clausum fregit* in Cheshire; and it was pleaded, that this Court ought not to take consuance of it, for that the defendant, at the time of the supposed trespass and bill exhibited, was an inhabitant of the county palatine where the trespass was made; "*et petunt jud.* if this Court will take consuance;" to which there was a demurrer:

In maintenance whereof it was said, that the declaration was against him *in custodia marescalli*; that his being in custody of the marshal was not traversable, no more than being the king's creditor in a *quo minus*. Besides, the defendant's being an inhabitant of the county palatine, does not hinder his being an inhabitant out of it; for a man may be an inhabitant in several places at once; and in all appeals and indictments of murder, the party is alledged to be an inhabitant in the place where the murder is committed.

A man's being the king's creditor in a *quo minus* is traversable. **HOLT, Chief Justice.** As to your case of *quo minus*, it is traversable; if the party come in due time to do it. And if one be a prisoner here, against whom one has a cause of action arising within the county palatine, so that his being a prisoner here hinders that person from proceeding against him below, surely the cause's arising within the county palatine shall not hinder us from having consuance of it here; but that is where he is first in custody of the marshal for cause, and another, or the same party, has another cause of action arising against him in the county palatine; and if the truth were so, that the defendant was in custody of the marshal before, for a cause arising within our jurisdiction, the defendant instead of demurring ought to shew it in support of our jurisdiction. But any plea of privilege is good to a declaration against one *in custodia marescalli*, if he was brought wrongfully there. As if an attorney of the common pleas be arrested upon a *latitat*, and is in custody of the marshal for want of bail, or suppose he puts in bail, it shall not hinder him of pleading his privilege; because he * cannot plead till he put in bail, if he be not in actual custody; and if we give judgment, it must be for the defendant.

If a person is in custody of the marshal for cause, may proceed against him for a cause arising in the county palatine. Any plea of privilege is good to a declaration against one *in custodia mar.* if he be there wrongfully.

* [536]
Ante, 113.

Case 895.

Lancaster against Lovelace.

Title to hold a court "according to the custom of the court afore-said," is well pleaded. **E**RROR of a judgment in the court of Canterbury. **FIRST**, It was excepted, that in making title to a court they laid to be a court by prescription *secundum consuetudinem curie præd.*; and that was absurd to lay a custom in a court to hold a court, but it should be laid in the city, &c.

Sed non allocatur, upon the authority of *Annesie's Case*, where the same exception was over-ruled; but besides, this was laid to Cro. Jac. 124 453. Yelv. 46. 1. Sld. 511. 1. Salk. 265. 2. Ld. Ray. 1543.

be

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Be a court time out of mind, according to the custom of the said court, and confirmed by charter.

LANCASTER
against
LOVELLACE.

SECOND EXCEPTION, It does not appear that the jurisdiction of the court was co-extensive with the city; and they alledge the cause of action only to have arisen within the city.

Defendant's appearance cures a defective statement of the jurisdiction of an inferior court.

BUT IT WAS SAID, that the defendant coming in and answering had waived that advantage.

THIRDLY, That the *venire* was, "*venire facias, &c. duodecim, &c.*" which ought to be set forth at large in case of an inferior court, where no *diminution* may be alledged; and the reason why such entries are allowed in the superior courts is, because one may alledge diminution, and thereupon have the matter certified at large; *vide* 1. Cro. 164. 1. Roll. Abr. 800. Style, 20. 164. 195. 1. Roll. Abr. 801. pl. 20. But against this was quoted Raym. 20. Raym. 217, 218. 2. Keb. 383. where this exception was over-ruled.

Diminution cannot be alledged to an inferior court.

HOLT, Chief Justice. They must set forth the proceedings as they are by the award of the Court, for no *diminution* lies to them; and all advantages must be taken against the matter, as it appears on the record; and we must take the *venire facias* to have been awarded as it is entered on the roll; and he said, there was never a precedent of entries in an inferior court in *Rassall*.

HOLT, Chief Justice, at another day: The want of "*quorum quilibet, &c.*" may be well, because it is "*duodecim de inhabitantibus* of the city;" but the want of filing the *qui nec* seems to be substance, and therefore fatal. *Qui nec* ought not to be in the king's case, because none can be of kin to the king; but there it must only be *qui non attingat* the subject *aliquâ affinitate*.

And per CLERK, on the civil side, They always file the writ, but *secus* on the crown side.

And PER CURIAM, Before justices of gaol-delivery, there is no other warrant for a jury but the award on the roll.

* [537]
Case 896.

* Anonymous.

HOLT, Chief Justice. If one would plead a plea amounting to the general issue, he ought to give the defendant *colour*, Ante, 377. either express or implied.

Hall against Bond.

Case 897.

DEBT by an administrator *cui administratio debito modo commissâ* Suit by administrator *cui administratio debito modo commissâ*; the defendant pleads over.

commissâ, ill on demurrer, but good by pleading over.

N n 2

PER

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HALL
against
Bond.

PER CURIAM. This had been bad if demurred unto, but is now helped by your pleading over; for you thereby admit he has a right of suit, and is administrator.

Cafe 858.

May against King.

To an *indebitatus assumpsit* for forty pounds for work and labour, A PLEA that there were mutual dealings between the plaintiff and the defendant; that they accounted together; and that thereupon the defendant was found in arrear only five pounds, &c. is bad; for it amounts to the general issue, and may be given in evidence thereon.

S. C. Comy.
Rep. 116.
S. C. 1. Ld.
Ray. 680.
1. Burr. Rep. 9.
Cro. Car. 384.
3. Lev. 238.
Ray. 42.
Fitzg. 202.
Comy. Rep. 98.
1. Ld. Ray. 235.

* [538]

7. Com. Dig.
"Assumpsit"
(G).
5. Com. Dig.
"Pleader"
(2. G. 11.)
1. Bac. Abr. 180.
4. Bac. Abr. 88.
2. Term Rep.
483.

INDEBITATUS ASSUMPSIT for forty pounds for work done, and quantum meruit for the same. The defendant pleads, that there being mutual dealings between the plaintiff and him, they came to an account; and that it did appear on the account, that the defendant was in arrear to the plaintiff but five pounds, which he promised to pay him; in consideration whereof the plaintiff did discharge him of the said debt and claim: to this plea there was a demurrer.

IT WAS NOW ARGUED for the defendant, that a promise, before it is broke, may be discharged by another promise; and a case in Trinity Term, in the twenty-second year of Charles the Second, was relied upon, and it was this: A man sold a horse to another for twenty pounds, and there is other dealing between them, and upon reckoning together it was agreed between them, that he that sold the horse owed to the other five shillings and no more; and in debt brought for the horse this special matter was pleaded, and held a good bar. *Vide* 1. Mod. 205, 206. 2. Mod. 44. And in many cases else one may confess and avoid the cause of action, or else plead generally, and give it in evidence; as in Maintenance one may confess and avoid it, by saying he was a Counsel at law, and did it for his fee; 21. Edw. 3. 17. and yet this would be good in evidence upon a Not guilty. 3. Cro. 900. To an action for a malicious prosecution, probable cause of suspicion is a good plea, though it may be given in evidence upon not guilty pleaded. 2. Cro. 130. Br. Maintenance, 16. 10. Co. 88. 9. Hen. 6. 64. That one may plead the Maintenance was for his fee, or generally Not guilty, and give it in evidence; and the diversity was said to be where the fact is complicated, * and may be apt to inveigle the jury; there, that the Court may be the better able to direct the jury, the special matter may be pleaded; and here it was said, that the defendant gave colour to the plaintiff; for we agree there was a cause of action once, but that it is now gone by the account; and formerly the special matter used to be pleaded in trover, and held well; as that the goods were bought in market overt, whereby the property was allowed once to have been in the plaintiff.

HOLT, Chief Justice. It is true, that a promise, before it is broke, may be discharged by a parol agreement, but after it is broke it cannot be discharged, without deed, by any new agreement; without satisfaction; as by accord with satisfaction, or by release in writing; and it is likewise true, that sale in market overt is a good plea in trover. But if one bind himself in a bond for the payment of twenty pounds to A. by a day certain; and A. buy a horse

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a horse of the obligor of the value of twenty pounds before the day, and then they two account together, and twenty pounds is set and agreed for the horse, in an action brought upon the bond he cannot plead the general issue; yet he may plead *solvit ad diem*; and must not plead it by way of account, but it must be pleaded according to the operation it has in law, and that is to be a payment; and so here. As if tenant for life grant his estate to him in reversion, it is a surrender, and must be pleaded as such, and not by way of grant; so here to plead this by way of account, when the operation in law is payment, will be ill. And *PER IPSUM*, If there be two dealers, and without coming to an account, they agree to be clear against one another, it would not be well, without coming to an account; and the case quoted out of the *Moderns* was the first of this kind, and by my consent shall be the last. And to plead it as an account is but argumentative of *payment*, which is direct, and therefore not to be allowed; nor need this be shewn for cause of the demurrer. And this is nothing like debt upon a simple contract, to which it is a good plea, that the defendant has given his bond for that debt, and that the plaintiff did accept it in satisfaction (a); or where upon a general issue that matter may be given in evidence; for the bond is no payment of the original debt, but a thing of a higher nature, which extinguishes it.

MAY
against
King,

And *PER CURIAM*, Judgment for the plaintiff (b).

(a) Ante, 86. 406.

(b) And see the case of *Rolls v. Barnes*, 1. Black. Rep. 65. where it is said to have been held by the Court on the authority of *Adderley v. Evans* in *Hilary*, 29. *Geo.*

2. that *in simul computassent* is not a good plea in bar to an action on *assumpsit*; for though true, it does not extinguish the original promise.

* [539]

* Ball against Smith.

Case 899.

DEBT UPON A BOND, and no such person as the plaintiff in being pleaded; *respond. ouster* awarded; for after attorney made and entered on record, the defendant cannot plead such a plea,

After attorney made and entered on record, cannot plead there was no such person as the plaintiff.

Baier against Palmer.

Case 900.

DEBT UPON A BOND, and the statute of Composition of two thirds in number and value pleaded; and to that a demurrer, and day given over; since which day the defendant pleaded, that since the last continuance the plaintiff did by his deed grant and agree to and with the defendant, to accept a bond for the building of a house in satisfaction of the first bond.

Covenant to take a bond in discharge of a bond, is not a good plea to debt on a bond, for it is not a release.

And now IT WAS HELD not to be a good plea, for it amounts to no more than a covenant, and not to a release.

N n 3

IT

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Pleading the plea *puis darrein continuance* is a relinquishing the former plea. IT WAS ALSO HELD, that pleading that plea, *puis darrein continuance*, was a relinquishing of the former plea, to which the demurrer was, contrary to *Hob. 81.* which was quoted.

S. C. 1. *Ld. Ray.* 693. And *HOLT, Chief Justice*, said, that a bond may be a satisfaction of the condition of another bond, before it is forfeited; *secus* S. C. *Salk.* 176. after.

If part of the money be paid had been paid *puis darrein continuance*, and an acquittance given for it, whether it ought to be pleaded *in bar* or *in abatement*; and *Style*, 112. where it was pleaded in abatement, was quoted; and *Allen*, 65. bad without acquittance; and there held, if one has ed in bar or acquittance in hand, he may plead in bar or abatement, at election. *Postea*, 541.

Cro. Jac. 82. 261. To which *HOLT, Chief Justice*, said, that as he remembered, but that he spoke upon an old memory, that when such receipt of part was pleaded in bar, it was no plea, that is, no plea to bar the whole debt or action, but only for so much as was received: as 2. *Vent.* 58. suppose debt be for forty pounds, whereof twenty pounds is paid Clift. 630. before the action brought, and that payment and acquittance plead- 1. *Com. Dig.* ed in bar, it is good for so much only, in bar. And the law will "Abatement" be the same where the payment is after the action brought; for (l. 24.) why shall it not be a bar for so much as well when it is paid after the action brought as before? for its being paid after the action brought does not falsify the writ more than its being paid before; for in both cases it equally falsifies the writ; and in both cases you may demand judgment *si actio* of the twenty pounds which you paid, and for which you have an acquittance. And the matter of the plea remains *ante et pendente placito*, for acquittance and payment is a good plea in bar at any time, but it shall be pleaded *quoad* so much only, and so it would have been if the payment had been of part before the action brought. But *Cro.* 342. *Moor*, 598. *Co. Ent.* 159. Debt upon bond for forty pounds, and pleaded in abatement, that pending the action the plaintiff had attached the defendant's money in *London*, and recovered it there; and the Court held in that case, that such receipt of part ought to be pleaded in bar *pro tanto*; but if it were a discharge by the act of the party, it ought to be only in abatement, that is when the payment is after the action brought; and that there is no diversity between this and a real action; for if an assise be brought for twenty acres, and afterwards an entry is made into one of them, it shall abate the writ.

But *HOLT, Chief Justice*, said, that was where the entry was by one without the consent of the other; but have you ever known it pleaded in abatement where both parties did consent? as when the entry was by virtue of a conveyance made by the tenant to the demandant.

But

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But *PER CURIAM*, It was adjudged for the plaintiff here upon the first point, and no resolution on the other point, *viz.* whether it should be in bar or in abatement (a).

BABER
against
PALMER.

(a) In debt on bond, payment of part and acquittance *pais darrain continuance* can only be pleaded in bar, *Pierce v. Paxton*, 1. Ld. Ray. 691. S. C. 2. Salk. 519. S. C. post. 541.

Anonymous.

Cafe 901.

HOLT, *Chief Justice*. If at one sitting one loses above fifty pounds to one, and so to another, he must pay it, for they are several contracts. So if one of them play with false dice, and the other with fair ones, he that plays with the fair dice shall recover his winnings.

Gaming. Ante, 258. 2. Mod. 54. 5. Mod. 6. Lut. 120. 1. Salk. 345. 1. Sid. 394. 2. Black. Rep. 706 1226.

Birch against Bellamy.

Cafe 902.

PER CURIAM. A tenant for years now cannot assign over his term without writing; but the assignment may be pleaded without saying it was by deed (a). If a thing might have been done at common law without writing, and an act of parliament comes and says it shall not be good without writing, that shall not alter the manner of pleading, but the pleading shall continue as before; and its being in writing shall come in evidence; but if a thing be made good originally by act of parliament, there you must plead all the circumstances of the act; as upon the statute of 32. Hen. 8. c. 1. of Wills, * you must set out that the will was in writing, and so plead it.

A term cannot now be assigned without deed, but need not be said so in pleading, but to come in evidence. Plowd. Com. 432. Ray. 450. 1. Sid. 142. 1. Lev. 81. Bull. N. P. 279.

(a) See *Villan v. Handley*, 2. Willf. 49.

* [541]

Redmond against Joseph.

Cafe 903.

DEBT UPON A JUDGMENT: The defendant pleads in bar, that a *capias ad satisfaciendum* was taken out against him at such a time, by virtue whereof he was taken in execution; and that the said *capias* was returned on record, but did not aver that the execution continued, or that the debt was paid; and on demurrer,

To debt on a judgment, a FLEA that the defendant was taken in execution is good, without averring that the execution continued.

HOLT, *Chief Justice*. If he was once in execution, it must be intended he continues so, if he has not paid the money (a); for if he has escaped, you should reply that of your side that are plaintiffs, for this is a plea in bar, and good to common intent. And he quoted two cases, where he had known escape replied to such a plea; and a taking in execution is a bar to all other remedies while it lasts, and we cannot intend an escape. And here if he had averred the continuance in execution, if they cannot traverse it of the plaintiff's side, what does his averment of it avail them?

Sid. 236. 7. Mod. 62.

(a) See the cases of *Vigors v. Al-* *Withey*, 1. Term Rep. 557. *Arch*, 4. Burr. 2483. and *Jaques v.*

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REDMOND *against* JOSEPH. and if he be not in execution, but escaped, they may reply it. And the writ issued out is not of record till it be returned, though the execution be good before any return.

Cafe 904.

Brown *against* Gullock.

In debt on a bond for foreign money, must declare of so much *English* value. ANTE, 81. IN DEBT upon a bond for four hundred godies, *East India* money, the plaintiff declared for one hundred and eighty pounds; and it was objected, that they ought to make their declaration according to their lien.

HOLT, *Chief Justice*. They must demand *English* money, and not foreign money, and they are to value it according to the value it bears here in *England*; but if a man will bring an action for foreign money, it must be detainue.

Cafe 905.

Pierce *against* Packston.

On debt on a bond, receipt of part of the money *puis darrein continuance* pleaded in bar, good. DEBT UPON BOND: The defendant pleads payment of part *puis darrein continuance*, which the plaintiff accepted, in bar.

HOLT, *Chief Justice*. The defendant could not have pleaded it in abatement, but must have done it in bar; and whenever a thing, which in its nature is a bar, happens, and is pleaded * *puis darrein continuance*, it admits of no answer; and this he said was not like the case of foreign attachment, though that has been held to be matter of payment, and therefore a good plea in bar; nor like the case of the demandant's entry into part of the land, *puis darrein continuance*, for that is the party's own act only. And he quoted the case of 3. *Hen. 7. 3. b. 5. Hen. 7. 41. a.* The first was debt upon contract, and receipt of part *puis darrein continuance* was pleaded; and there it was held to be no good plea, because it might be given in evidence; but if it had been upon debt upon a specialty, it must have been pleaded in bar. *Vide 17. Edw. 4. 22. Edw. 41.*

Cafe 906.

The King *against* Fuller.

Indictment for procuring an attorney to be pressed to sea. FULLER being convicted upon an indictment for procuring an attorney of the court, who married his sister, to be pressed to sea, was fined one hundred marks.

Cafe 907.

The King *against* Yates.

Outlawry reversed, not appearing where the court was held. AN OUTLAWRY for *high treason* was reversed, upon the exception, that it did not appear where the first court was held.

4. Burr. 2564. 4. Hawk P. C. page 189.

Fitter

Fitter *against* Veal.

Case 908.

IT was a special action of trespass, in which the plaintiff declared of a battery and wounding of him at such a time, for which he brought trespass, and recovered damages for the beating and wounding; but that since that time, by reason of the wounding, he was fain to be trepanned, and have a bone taken out of his skull, so that he thereby became maimed; and the former recovery being pleaded in bar,

THE QUESTION was, If this action did now lie?

SIR B. SHOWER urged that it did, for that nothing was recovered for the maim before, for it was not known or in being at the time of the former recovery; and the question is, Whether an action will not lie for a consequential damage that happens to one from the wrong of another, subsequently to a recovery for the original wrong? And surely it is * hard it should not; for the wrong done by the stranger, and the damages arising thereby to me, are the ground of the action. And if a man does in time subsequent suffer by the wrongful act of a stranger, he ought to have remedy for it; and we are here sufferers by this battery in a new and higher degree, and this since the recovery; therefore we have received no satisfaction for it, because the jury could not have it under their consideration, being not then discovered. If this one act had been to the damage of two, both of them should recover reparation with respect to their several damages, though it be but one entire act. *Ergo*, If one act of mine will prejudice another twice, or in several degrees, there ought to be several reparations, more especially when one of the species or degrees of the damage is not known till after a recovery for the other; and after recovery for this trespass, if the plaintiff had died within the year, the defendant would be punishable by indictment at suit of the king, or on appeal at suit of his wife or heir. And he said, if *A.* entered into my ground, and breaks down my wall which keeps out the sea; and I bring trespass, and recover damages, and I rebuild my wall, but by reason of the newness thereof it is broke down by a new storm, which the old wall would have resisted; shall I not recover new damages for that loss?

If, after recovering damages in an action of assault, battery, and wounding, the plaintiff is put to great expence, in consequence of the injury he received, yet he cannot bring a second action to recover further compensation for the consequential damage he sustains; for it shall be intended that the jury considered all possible consequences on the trial of the first action.

* [543]

S. C. 1. Salk. 11.
S. C. 1. Ld. Ray.
339. 692.
S. C. Holt, 22.
Cro. Jac. 373.
4. Co. 43.
1. Leon. 319.
2. Sura. 977.

CURIA. This is a new case, and none to be found that we know like it; for every man that recovers damages, it is supposed he has received according to the damage that he has received. If the plaintiff's surgeon had come at the last trial, and shewed that the plaintiff was not cured, the jury would have considered that matter; and then was his time to consider of the heinousness of the battery, and to give evidence of it. And in this case the *gist* of the action is the injury, or first battery; and the wounding and maiming is but aggravation of that injury: but in some cases the damage is the ground of the action, as where a master brings

action

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FITZ
against
YEAR.

* [544]

action for beating his servant, whereby he loses his service. And it shall be intended here that the jury gave entire satisfaction for the battery. And as to the case put of the sea-bank, the plaintiff shall recover damages for the overflowing of his lands, and to rebuild his wall; and the danger of the new wall, if there be any thing in that too, may be considered; but this must be all at once. And though there be nothing of maim in the first declaration, yet a recovery in trespass and battery is a good bar * in maim. 4. Co. 43. a. In criminal matters one may be twice punished for the same offence; for if indictment be for assault and battery, and the party is convicted and fined, yet the plaintiff may have trespass, and recover damages against him; and if afterwards, within the year, the party die, the other may be hanged for the murder.

But *per* HOLT, Chief Justice, If a man be dangerously ill of a battery, and is indicted for it, the indictment for the battery ought not to be tried till after the year. And if A. wound B. and he thereof die within the year through the unskilfulness of surgeons, yet it is felony in A. And if A. bring an action for words actionable in themselves, and recover damages, and afterwards, by reason of the words, she lose a husband, yet no action will lie afterwards for the special damage: and so if the words be actionable for the special damage which party has suffered by reason of them, and for and that damages are recovered, and after the party has another special damage.

Cases T. H. 55.

AND THEY ALL HELD, that this is not like the case put, where a *tort* is done to two by one act, for there a recovery by one is not for the *tort* done to the other; and upon declaration for assault, battery, and wounding, one may give maim in evidence, and recover damages for it; and therefore a recovery in such an action is a good bar to an action for maim. And this is not like the case of a nuisance in erecting a pent-house, whereby the rain falls upon my house or garden; or stopping my lights, wherein I shall recover damages for every new hurt *in infinitum*: for, first, the battery is a transitory act, and the nuisance is a continued one as long as it lasts; therefore damages cannot be recovered for it at once: secondly, every new rain that falls, or every light that is stopt, is a new nuisance; but every new ill consequence of the battery is not any new wrong of the defendant.

Et PER TOTAM CURIAM, Judgment was given for the defendant.

Case 909.

The King *against* Young.

Before outlawry
for murder can
be reversed, a
scire facias must

YOUNG was outlawed for murder, and brought a writ of error; and being brought to the bar, was asked what he could say why execution should not be awarded against him; and pre-

go to all the lords, or Attorney General must on record confess there are no lands.

sented

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sent a writ of error upon his knees, and assigned for error, that it did not appear that the county courts, at which the proclamations were, were holden for that county (a).

* [545]

* HOLT, *Chief Justice*. You must bring a *scire facias* against all the lords mediate and immediate, or MR. ATTORNEY must come into court and confess on record that you have no lands or tenements; though he said he had known outlawries reversed without such *scire facias*, but that was a dangerous course for the lords mediate and immediate, who, though when they are summoned by such *scire facias*, could not plead *in nullo est erratum*, nor bar the reversal of the judgment, yet may plead releases or fines levied to them by the outlawed person after the outlawry, in bar of restitution; but since they cannot maintain the judgment, such *scire facias* seems rather of caution than of necessity (b).

Postea Mich.
13. W. 3.
Dominus Rex
v. Young.

1. Jo. 427.

And after reversal of the outlawry in this case, upon THE ATTORNEY GENERAL's confession of "no lands," the defendant was committed to *Newgate*, to undergo his trial the next sessions.

(a) Rex v. Yates, ante, 542.

(b) See 4. Hawk. P. C. ch. 50. s. 14.

Wilbraham against Doley.

Case 910.

IN error to reverse an outlawry for error in law, the question was, Whether the plaintiff must give bail to the original action, as he must do when it is to be reversed for want of proclamations upon the statute of 31. Eliz. c. 3.?

In error to reverse outlawry for error in law, bail need not be given to the original action, as it must be for want of proclamations.

And GOULD, *Justice*, cited a case out of *Littleton's Reports*, where he was held to bail upon an error in law, the original cause of action being such as required special bail.

But per HOLT, *Chief Justice*, They ought not to be holden to bail upon any error in law, for the statute of *Eliz.* mentions only want of proclamations; and your case out of *Littleton's Reports* is bunglingly reported. And they all said, if it did appear to them that there was a want of proclamation in the outlawry, and an error in law besides, though the party assigned the error in law only, yet they would reverse it for the want of proclamation, and so hold him to bail; but if there were not want of proclamation, but merely an error in law, there need be no bail; for as the statute made a new error for the advantage of the outlawed person, so it thought to recompense that with another to the creditor, that in that case he should have good bail to his action; but however they directed the party outlawed to put in bail to answer the condemnation, or render his body.

S.C. 2. Ld. Ray.
591. 605.
S.C. 2. Salk. 500.

NOTE,

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NOTE: *Per* HOLT, *Chief Justice*, Special bail to reverse an outlawry must be simply to answer the condemnation; but other special bail * is to answer condemnation, or render his body: and it was agreed, if the party were taken up upon the *cap. utlagat*, he must give bail to reverse the outlawry; and they further said, the sheriff was fineable for leaving such errors in outlawries.

* [546]

Case 911.

Anonymous.

Justices of peace of the county may do what justices of the division are appointed to do by act of parliament. **HOLT, Chief Justice.** Where an act of parliament says justices of peace of such a division shall do so and so, it is only directory *quoad* the division; and any of the justices of the county may do it.

Case 912.

Anonymous.

Vill is a constabulary. **HOLT, Chief Justice.** A vill and a village are the same, and a hamlet is a division of a vill. 18. *Edw.* 1. The whole vill is a constabulary, and a hamlet is commonly a tithing.

Case 913.

Pratt against Rutleis.

On an avowry in replevin of a distress for rent, if the plaintiff be nonsuited, **DISTRESS** for rent, replevin, and avowry, and the plaintiff in replevin nonsuited, a *retorno habendo* awarded, and a writ of enquiry of damages issued out, and before execution a *second deliverance*.

and, on a retorno habendo awarded, a writ of enquiry of damages be issued; a writ of second deliverance issued before execution of the writ of enquiry is a superjedes of the retorno habendo, but not of the writ of enquiry. The doubt was, Whether this *second deliverance* be a *superjedes* of the writ of enquiry (a)?

S. C. Salk. 95. Godb. 185. Barnes, 427. And that it was, was urged, that the writ of enquiry is grounded upon the *retorno habendo*, and the *second deliverance* is a *superjedes* of that, and by consequence of the writ of enquiry; for what superjedes the judgment ought to superjede that which is grounded upon the judgment (b). The plaintiff in replevin has the distress delivered to him upon the *second deliverance*; and if he has judgment thereon, how shall the avowant make up his record of the enquiry? And this difference was taken between the plaintiff in replevin's being nonsuited, and judgment's being against him upon *nihil dicit*; for a judgment upon a *nihil dicit* is a final bar, and no *second deliverance* will ever lie after; but after nonsuit one may have a *second deliverance*, and this *second deliverance* is given by the statute of *Westminster the Second*, c. 2. in lieu of a second replevin; for at common law, if the plaintiff in replevin had been nonsuited, he could have a new replevin *toties quoties*; but that statute in lieu thereof gives a *second deliverance*,

(a) See the statute, 17. *Car.* 2. c. 7. "Deliverance," and 2. *Inst.* 341.

(b) See *Brooke's Abrid.* title "Second

which

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which is a judicial writ of the Court where the replevin was before brought, and if he is nonsuited in that, he is gone. But since that statute of * *Westminster the Second*, the statute of 21. Hen. 8. c. 19. gives damages to the avowant upon a nonsuit of the plaintiff in replevin, as well as upon any other judgment in replevin; and therefore it should seem, if the *second deliverance* be made a *superfedeas* of the *retorno habendo* and writ of enquiry, the statute's giving damages would be of no avail. * [547]

BUT it was answered to that, that being so would by no means render the statute ineffectual as to the damages; for if judgment be for the avowant upon the *second deliverance*, he shall have the damages of the nonsuit included therein: and all the said learning of replevin at common law, and of the *second deliverance* by the statute of *Westminster the Second*, was agreed to by all. 2. *Inst.* 340, 341. *Dy.* 41. b. and likewise that 21. Hen. 8. c. 19. gives damages upon a nonsuit in replevin. (a).

But it was strongly urged the writ of enquiry was superfeded in this case by the *second deliverance*, which, AS WAS AGREED, superfedes the *retorno habendo*; and this case was put as parallel with it. By the statute of *Westminster the Second*, c. 5. damages are given in a *quare impedit*, yet if a *quare impedit* be brought against a patron and his clerk, and they both plead the same plea in bar, and the patron dies, and the plea be found for the incumbent, he shall have no damages, because we can have no judgment: so here the judgment for a return being superfeded, there can be no damages.

Contra were quoted *Palm.* 403. *Latch.* 72. that the *second deliverance* is no *superfedeas*, for otherwise that statute of 21. Hen. 8. c. 19. would signify little.

HOLT, *Chief Justice.* The damages are not given by this statute of 21. Hen. 8. c. 19. for getting the thing avowed for from the avowant, but for the vexation in bringing a replevin without cause; and the nonsuit is sufficient evidence that there was no cause of replevin, at least it is evidence of a vexation; and if the avowant cannot maintain his avowry, the plaintiff shall recover damages for the distress. If a man bring an action, and is nonsuited, the defendant shall recover damages for the nonsuit; but if the plaintiff bring a new action, and recover, he shall recover damages, but shall have nothing for the costs of the nonsuit; and if *second deliverance* be brought before *retorno habendo* executed, it shall superfeede the execution; if after it is executed, it shall notwithstanding fetch back the distress.

Quare quid inde venit (b).

(a) Bro. Ab. "Second Deliverance." 2. Plowden, 266.

(b) It is said, same case, 1. Salk. 95. that the Court was of opinion that this is a *superfedeas* to the *retorno habendo*, but not

to the writ of enquiry; and see *Waterman v. Yea*, 2. Will. 41. *Cooper v. Sherbrooke*, 2. Will. 116. *Barker v. Lade*, Carth. 253. *Codb.* 185. *Barnes*, 427. *Bull. N. P.* 53.

Anonymous.

Cafe 914.

* Anonymous.

If order of justices be quashed, order of sessions falls of course.

PER CURIAM. If the order of two justices be quashed here above, an order of sessions confirming that order falls of course; for the justices at the sessions have not power to make an original order.

Cafe 915.

Anonymous.

Order of justices confirmed on appeal is final to the appellants.

PER CURIAM. If an order of justices for the removal of a poor person be confirmed on appeal, the appellants are ever concluded from discharging themselves of that poor person, as to all places; for if another parish than that from whence he is sent to them by the two justices, be the last place of his legal settlement, they may send him thither by an order of two justices to be made for that purpose; or upon appeal, another place's being the place of his last legal settlement, may be given in evidence at the sessions upon the appeal (a).

AND NOTE: One cannot be removed to an extraparochial place (b).

(a) See Harrow v. Ruidip, 2. Salk. 524. Mynton v. Stoney Stratford, Salk. 527. Swancomb v. Shensfield, 2. Salk. 492. Cirencester v. Coin St. Aldwins, Burr. S. C. 17. and Mr. Conft's edit. of Bott's P. L. 2. vol. 807 to 819.

(b) But see Rex v. Rufford, Stra. 512. 8. Mod. 39. Rex v. Welbeck, 2. Stra. 1143. 1. Conft. 24. Rex v. Bedfordshire, Cald. 167. Rex v. Peterborough, Cald. 238. Rex v. Ranton Abbey, 1. Term Rep. 207. and 1. Conft. 66 to 74.

Cafe 916.

Lacy against Kynafton.

Indenture made by A. and B. "to save C. harmless," is not a defeasance of a covenant wherein A. is bound to pay C. a sum of money. S. C. ante, 221. 415. S. C. 1. Ld. Ray. 419. 688. S. C. Salk. 573. 575. S. C. 3. Salk. 298. S. C. Holt, 178. 218.

COVENANT by the wife of *Thomas Lacy*, as administratrix to her husband, against the defendant, upon an indenture bearing date the first of *May* 1676, made between *Thomas Killigrew, Esq.* and others, of one part, and the plaintiff's intestate of the other part; reciting, that several articles had been made between the said parties, in all to the number of four; and that "it was covenanted and agreed between the said parties, that from thenceforth all the said articles should be void; and that thereupon *Killigrew* and *Kynafton*, and the rest, did jointly and severally covenant and agree to and with the plaintiff's intestate, that if he at any time should be minded to give over, and desist acting in the company of comedians of his Majesty's **THEATRE ROYAL**, and would give notice of such his intent within six months before, he should have six shillings and three pence for his share every acting day, and also one hundred pounds to his executor or administrator, within three months after his death; and if he died without desisting to act, and notice as aforesaid, that then the sum of one hundred pounds should

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" should be paid to his executor or administrator within three months after his death : " and averred that all his life he continued in the Company, and died in it.

And for the one hundred pounds this action was brought, it being not paid within the time after his death.

* Upon *oyer* of this deed several articles are set out; and the defendant pleads in bar of the action, that after the sealing and delivery of the deed mentioned in the declaration, *viz.* the first, of the sixth of *May* 1676, there was another indenture made between the plaintiff's intestate and the other parties before-mentioned, of one part, and the defendant of the other part, with the same recital as in the deed in the declaration, and the same articles and covenants. But that which is relied upon is, that it is therein agreed by *Killigrew*, the plaintiff's intestate, and others jointly and severally, to and with the defendant, " that if the defendant *Kynaston* should give notice of his intent to give over acting in the said Companies three months before-hand, he should have an allowance of six shillings and three-pence a day every acting-day, as above, and one hundred pounds should be paid to his executor or administrator, in case he died without any such notice;" and that it was FURTHER COVENANTED, " that if the defendant *Kynaston* should give any such notice, he should be free and discharged of and from all debts, duties, sums of money, or any other security entered into, or thing by him taken up for the use of the Company;" AND THAT " the said *Killigrew*, *Lacy*, the plaintiff's intestate, and the rest, should from time to time after such notice save harmless and indemnify the defendant *Kynaston*, his executors and administrators, from all such debts, sum and sums of money, and from all securities entered into for that purpose alone, or together with the rest of the Company, or any of them, for any matter or thing relating to the Company;" AND THAT " they should not admit any into the said Company, to have the benefit thereof, without such person entered into the above-said agreement." IT WAS FURTHER AGREED, " that the said six shillings and three-pence as aforesaid, and the said one hundred pounds, by the true intent and meaning of the said agreement, should be in full satisfaction of all the respective parties interest in the cloaths, books, scenes, &c. of the said Company, and that the Company should have them in consideration thereof."

The plaintiff's intestate died first, but the defendant insists upon it that he gave off acting such a time, and thereof gave notice six months before, and is not one of THE COMPANY, and so prays judgment of this indenture; and to this plea there is a demurrer.

The

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The question is, Whether by the indenture made by the plaintiff's intestate, together with *Killigrew* and the rest of the Company, with the defendant, to save him harmless, &c. be a defeasance or discharge of the covenant wherein * *Kynaston* is bound to pay the plaintiff one hundred pounds after his intestate's death?

And WE ARE ALL OF OPINION, that it is not a defeasance, though the defendant gave off acting, and thereof gave notice according to the covenant; but that it is only a covenant, and only to be used as such, and that for these three reasons.

IF a defeasance be to one of the parties, it is to all. FIRST, It is a covenant made by the plaintiff's intestate, *Killigrew* and the rest, with the defendant *Kynaston*, to save him harmless from all covenants entered into by him upon account of the Company; and this must be a covenant, and construed as such, because it is in conjunction with others jointly and severally, and can be no more than a covenant by them all. And though such an indenture may be between the other parties to this deed and *Kynaston*, as here is between the plaintiff's intestate and him, yet that does not appear to us. Now, then, if we should construe this deed, as to the plaintiff's intestate, as a defeasance, we would make it void as to the others; for if it be a defeasance as to one of the parties, it can be of no purpose as to the others; and then the whole is *ipso facto* void, upon the performance of that which makes the defeasance, and need have no other operation; and such construction would alter the frame of the agreement, and make the covenant of the others void.

Where deed intends mutual remedies, not to be construed a defeasance. SECONDLY, It is most apparent from the frame of the deed, that this is a bare covenant, and no more. The intent of the deed was, that the parties were to trust one another upon the mutual agreement, and that that deed should have no other operation than to give them mutual remedies; for there is care taken that there should be a saving harmless from all manner of incumbrances that *Kynaston* was engaged in solely or jointly upon account of the Company. Now there are other matters where this clause must operate by agreement only, and so cannot be a defeasance; and if it were in express terms said, that the defendant should be saved harmless from this very payment, as well as from the rest; yet the intent was, that he should trust to his agreement, and rely thereupon, and not to vacate or discharge an agreement before, but have his action of covenant in case of any charge upon him.

A defeasance is, that upon the conditions performed the thing is to cease. THIRDLY, In its nature it is not a defeasance; the nature of a defeasance is, that upon condition performed, or upon such and such terms, the thing to be defeasanced is to cease; and here are no such words here, therefore there want proper words of defeasance; and if it be construed a * defeasance, it must be, not because the words import any such thing, but from the nature of the thing; and then consider what the consequence would be to make

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make it a defeasance, it would be to make the plaintiff without remedy. For if several covenant jointly and severally, a defeasance to one of them is a defeasance to all; and it is impossible to defeat as to one, without defeating as to all. If it were in these terms, that from the death of *Kynaston*, or his giving notice to give over, the covenant should be void, as to him only; yet that would discharge all the rest, for it would be a release as to him; and if so, every one of them might plead it; and where a lien is joint or several at the election of the party, there a release to one is a release to both, for the other may plead it to debt against him upon the bond, &c. *Vide Co. Lit.*—And if a defeasance works a release and discharge, a defeasance to one is a defeasance to all, as a release to one is a release to all; but a case directly in point is 34 *Hen. 8. Br. Estranger al fait* 31. The case was, Whether a defeasance of a bond could be good to a stranger to the bond; as if *A.* be bound to *B.* in a certain sum, and *B.* covenants and grants with *C.* a stranger to the bond, that if *A.* did such a thing the obligation should be void, and held that it could not be a good defeasance; but if *A.* and *B.* be bound to *C.* and *C.* agrees with *A.* that upon doing such a thing the obligation shall be void, that will be a good defeasance to *B.* because a discharge to one is so to the other. Now, to construe this covenant a defeasance would destroy the whole agreement. And to make such a construction as would destroy a man's security, and defeat him of his covenant and agreement that he had made and procured for his safety, would be a very injurious one.

It is objected, that a perpetual covenant amounts to a release.

ANSWER. A perpetual and absolute covenant, for example, to an obligor, that the obligee would never sue upon the obligation, is a release; or if it be with condition never to sue, it will be a defeasance, though there be no words not to sue in the obligation, but only in the condition of it; and the reason of this is to avoid a circuitry of action; because there one should precisely recover the same damage that he had suffered by the other's suing the bond. *A.* is bound to *B.* and *B.* covenants never to put the bond in suit against *A.*; if afterwards *B.* will sue *A.* on the bond, he may plead the covenant by way of release. But if *A.* and *B.* be jointly and severally bound to *C.* in a sum certain, and *C.* covenants * with *A.* not to sue him, that shall not be a release, but a covenant only; because he covenants only not to sue *A.* but does not covenant not to sue *B.* for the covenant is not a release in its nature, but only by construction to avoid circuitry of action; for where he covenants not to sue one, he still has a remedy, and then it shall be construed as a covenant, and no more. 48. *Aff. pl.* 44. A man made a feoffment in fee with warranty against all persons, feoffee by his covenant grants and agrees not to take advantage of this warranty, and then he is impleaded, and vouches the feoffor, he may plead this covenant in bar of the warranty; because the feoffee has bound himself thereby not to take advantage

A defeasance to one is a defeasance to all.

A covenant that the obligee would never sue is a release.

Hrd. 113. 21.
Hen. 23, 24.
Vid. 3. Lev. 42.
1. Inst. 126. b.

* [552.]

If *A.* and *B.* be jointly and severally bound to *C.* and *C.* covenants not to sue *A.* it is not a defeasance.
Vid. 1. Inst. 146. b. 267.

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tage of the warranty; but if the covenant had been not to bring a *warrantia chartæ*, or not to vouch, then it had been a covenant only, and the covenantor hath other remedy and use left him of his warranty; and the covenant would not be a release in that case, because it does not exclude all his remedy upon the warranty. So then, if two be jointly and severally bound, and the obligee covenants with one of them not to sue him, yet he may sue the other, because he might without his covenant sue one of them without the other; and therefore, there being nothing in the covenant to preclude him from that benefit, he has it still left in him: and here the plaintiff's intestate, notwithstanding this covenant, has remedy against the other covenantees; therefore *Kynaston* cannot use it as a release; for then it would be a release to 'all the rest, which would be contrary to the nature and frame of the deed. *Vide* the Case of *Gawden v. Draper* (a). *A.* covenants with *B.* to pay him three hundred pounds for the use of the wife of *A.* only for her life; and covenant brought upon this, and breach assigned, that there was so much of the three hundred pounds arrear; defendant pleads, that there was another indenture between him and the plaintiff since the date or delivery of the covenant deed declared on, reciting the said covenant and agreement for the payment of the three hundred pounds, wherein it was covenanted and agreed, that so long as *A.* and his wife did cohabit, the payment of the three hundred pounds should cease, and avers, that they did cohabit for the time the said arrear became due, and pleads this in bar of the first agreement; and there are express words that the payment should cease during the cohabitation; and there had been no great harm to construe this as a release of the arrearages during the cohabitation; but yet it being a sum in gross, and the covenant temporary and not perpetual*, they held it no good bar: but he said, if it had been a rent for years, and a covenant or agreement by the lessor to lessee, that it should not be paid, or that it should cease for such a time, that would amount to a grant of the rent for so long, and it would in that case cease and revive again; but this was a sum in gross; and though it was defeasible, yet because it was not entirely defeasanced, they would not allow a subsequent temporary agreement to be a release of it.

* [553]

And so PER TOTAM CURIAM the plaintiff had judgment.

(a) 2. Vent. 217.

Case 917.

The King *against* Jonson (a).

Sessions may
make original
order to dis-
charge appren-
tice. S. C. Salk.

THE justices of peace at the sessions, without any previous application to the justice of peace, or magistrate of the corporation, an order for discharging an apprentice from his

68. S. C. 2. Salk. 491. S. C. Holt, 511. Ante, 498. Ante, 350.

(a) The same point was, at the same time, decided in the case of *Rex v. Fenwick*. Note to original MS. And see *Rex v. Hayes*, ante, 350, and Mr. Condit's edit. of Bott's P. L. 1. vol. 512 to 516.

master

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thaffer; and likewise that the master should refund some of the money that he had received with the apprentice; and the great debate was, whether this order, being made at the sessions without any application to a justice of peace, &c. was not void and *coram non judice*; for it was said, the sessions had no jurisdiction of the matter, but when it came before them by way of appeal.

THE KING
against
JONSON.

And HOLT, *Chief Justice*, after great consideration, said, that if it were a new thing, he would be of opinion, that the justices at sessions ought not to meddle with it at the first instance; but since there have been so many orders made so by them, and that the usage had so prevailed, he would not alter it now; and as to the restoring the money, he said, the (a) order was very good in that point, for the words of the statute are, "that they shall do what in equity they shall think proper."

And the order was affirmed PER CURIAM.

(a) Vide ante, vol. 1. p. 2.

The King against The Inhabitants of the Parish of Cae 918.
Aickles.

A BOY set out an apprentice to a master in one parish, who by writing did assign and turn him over to another master, where he served his time in the parish of A. and the boy being now poor,

Apprentice in law is not assignable; but if under the assignment he serves his time in another town, he gains settlement there.

THE QUESTION was, Whether he had gained a legal settlement in A. ? and an order of two justices was for removing him to another town, as not legally settled in A. because an apprentice is not assignable in law.

S. C. Salk. 68.
S. C. Ld. Ray. 683.

PER CURIAM. It is very true, an apprentice is not * assignable; yet here the boy served during his apprenticeship in the parish of A. and if one master make a contract with another, that the other shall have the service of his apprentice, that is good between themselves; and though the words be "grant, assign, and turn over," which indeed cannot alter the legal interest of the apprentice, yet it amounts to an agreement that he shall serve the other during the time; like the case where one assigns over a bond to another, which in its nature is not assignable over, but if he do assign it over, it is a good agreement, that the assignee shall have the money to his own use; and so is the case of *Deering v. Farrington* (a), where one was to receive a proportion of damage from the town of *Hamburgh*, and it was stipulated, that the town should pay so much to the parties that had suffered, one whereof assigned his part or proportion of the reparation to another, notwithstanding which he after received the money to his own use; whereupon the assignee brought covenant against him, and the words of the deed were only "*assignavit et transposuit*;" and though the thing in its

* [554]
S. C. 1. Const. 521.
1. Will. 96.

(a) 1. Mod. 113. 3. Keb. 304.

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against
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PARISH OF
AICKLES.

nature was not assignable, yet it was enough to bind the assignor to suffer the assignee to enjoy it (a). So here, in strictness, an apprentice is not assignable over, yet by agreement between the masters, it may be so far done, as that covenant lies for an interruption of enjoyment of his service; then the apprentice serving upon such an assignment, is a good service of an apprentice; and therefore sufficient to give him a settlement in A.

And the order was quashed (b).

(a) See Mouldsdale v. Birchall, 2. Bl. Rep. 820. and the cases there cited. v. Shereditch, 1. Stra. 10. Rex v. East Bridgford, 1. Burr. 133. Baxter v. Ben-

(b) See Rex v. Channel, 3. Keb 519. field, 1. Const, 523; and the Statute 32. Rex v. Banner, Stra. 48. Holy Trinity Geo. 3. c. 57. l. 7.

Cafe 919.

Anonymous.

Writ of appeal
should be return-
ed non inventus be-
fore capias goes.

PER CURIAM. The original writ of appeal ought to be returned "*non est inventus*," before a capias awarded.

Cafe 920.

Anonymous.

An attorney has
a lien on paper
in his hands.
Skin. 1.

NOTE: The Court will not compel an attorney to give writings, without the other party agrees to pay him his reasonable demands.

2. Mod. Cases, 340. Stra. 621. 547. Dougl. 104. 226. 238. 2. Atk. 214. 3. Term Rep. 275.

Cafe 921.

Anonymous.

The disposition
of pews belongs
to the ordinary.
If one purchase
a pew, his inter-
est therein
ceases by ceas-
ing to be a pa-
rishioner.

HOLT, Chief Justice. Of common right, the disposition of pews in a church belongs to THE ORDINARY (a), but the parish is bound to repair them; and it is only rescancy that makes right to a pew in a parish (b); for if one purchase a pew there, and afterwards leave it, his interest in the pew is gone; and if he should return again into the place, yet he must renew his interest; but if a person cease to be a housekeeper in a parish, but continue still in the parish as a lodger, and * go to church, and is taken notice of as a parishioner, though he be but a lodger, yet his interest which he had in the purchased pew continues.

* [555]

(a) Ante 40. Godb 200. 2. Eulst. 150. 2. Lev. 241. Cio. Jac. 366. 1. Salk. 367. 3. Com. Dig. "Eglise" (G. 3.)

(b) But see the case of Stocks v. Booth, 1. Term Rep. 423. Rogers v. Brooks, 1. Term Rep. 431. notis. Griffith v. Mathews, 5 Term Rep. 297.

Cafe 922.

Anonymous.

Proceedings at
former trial must
be proved before
evidence of what
done there. Postea, p. 565.

NONE can be admitted to give evidence of what was done at the former trial, without the proceedings thereat be proved.

Anonymous.

Anonymous.

Case 923.

NOTE: To maintain an action for the biting of the defendant's dog, it must be proved that he knew his dog to be used to bite; but one instance is sufficient in that case (a), though to satisfy the words of the statute of — *Eliz.* — concerning leases of lands usually letten, the lands must have been letten twice at least.

In action for a dog's biting, must prove the owner knew the dog used to bite. Cowp. 826. Dougl. 658.

(a) Bolton v. Banks, Cro. Car. 254. 606. Buxenden v. Sharp, 2. Salk. 662. Kinnian v. Davis, Cro. Car. 487. Mason v. Jenkins v. Turner, 1. Ld. Ray. 118. v. Keeling, ante, 332. S.C. 1. Ld. Ray. Smith v. Pelah, 2. Stra. 1264.

Anonymous.

Case 924.

IN case for a malicious prosecution for felony, brought after acquittal, it was agreed that the declaration must agree with the indictment substantially.

A variance between the indictment and declaration is fatal.

ration for the malicious prosecution

And here the indictment being for stealing "*unum finitunculum*," "ANGELICE, a callico quilt," and the declaration *unum finitunculum*,

IT WAS ADJUDGED a material *variance* (a).

But the declaration having besides laid generally, that he charged the plaintiff with felony before a justice of peace, IT WAS HELD sufficient to maintain the action (b).

A declaration for a malicious prosecution stating the charge generally, is good.

AND LIKEWISE, that it was necessary for defendant here to prove a felony committed, and also a probable cause of suspicion (c).

Probable cause is a good defence in an action for malicious prosecution.

(a) See Barnes v. Constantine, Cro. Jac. 32. Buthby v. Watson, 2. Black. Rep. 1050. Franklyn v. Webb, Espinasse Dig. 532. Pope v. Foster, 4. Term Rep. 590.

(b) The declaration must state specially how the prosecution terminated. Lewis v. Farrell, 1. Stra. 114. Farrell

v. Nunn, Bull. N. P. 14. Fisher v. Bristow, Dougl. 205. Morgan v. Hughes, 2. Term Rep. 225

(c) See Knight v. Jermyn, Cro. Eliz. 134. Pain v. Rochester, Cro. Eliz. 871. Johnston and his Wife v. Browning, 6. Mod. 216. Savil v. Roberts, Salk. 15. Parrott v. Fishwick, Bull. N. P. 14.

MICHAELMAS TERM,

The Thirteenth of William the Third,

I N

The King's Bench.

Sir John Holt, Knt. Chief Justice.

Sir John Turton, Knt.

Sir Littleton Powys, Knt.

Sir Henry Gould, Knt.

Sir Thomas Trevor, Knt. Attorney General,

John Hawles, Esq. Solicitor General.

} *Justices.*

* [556]

Case 925.

Information for
pretending him-
self to be be-
witched.

S. C. 5. St. Tr.
486.

S. C. 6. St.
Tr. App. 59.

* Hathaway's Case.

ONE *Hathaway*, a most notorious rogue, feigned himself bewitched and deprived of his sight, and pretended to have fasted nine weeks together; and continuing, as he pretended, under this evil influence, he was advised, in order to discover the person supposed to have bewitched him, to boil his own water in a glass bottle till the bottle should break, and the first that came into the house after should be the witch; and that if he scratched the body of that person till he fetched blood, it would cure him; which being done, and a poor old woman coming by chance into the house, she was seized on as the witch, and obliged to submit to be scratched till the blood came; whereupon the fellow pretended to find present ease. The poor woman hereupon was indicted for witchcraft, and tried and acquitted at *Surrey* assizes before *HOLT*, *Chief Justice*, a man of no great faith in these things; and the fellow persisting in his wicked contrivance, pretended still to be ill, and the poor woman, notwithstanding the acquittal, forced by the mob to suffer herself to be scratched by him. And this being discovered to be all imposition, an information was filed against him.

— against

Michaelmas Term, 13. Will. 3. In B. R.

— against Tracy.

Case 926.

MOVED for leave to file an information against him for rescuing a person from sheriff in the *Temple*.

On rescous returned, it is not traversable.

But *PER CURIAM*, You had better get a *rescous* returned, and bring an action upon the case against him; and the *rescous* after return thereof is not traversable: and though the usual fine * upon a *rescous* returned be only four nobles, yet surely that must be understood where the person rescued is re-taken, otherwise the fine may be higher.

* [557]

Sheriff of Cumberland's Case.

Case 927.

PER CURIAM. It is the constant practice for sheriffs to take bail-bonds, according to 23. *Hen. 6. c. 9.* from persons taken up upon *attachment* (a); and no remedy against him upon a *cepi* returned, if he has him not at the day, but to amerce him.

Sheriff takes bail-bonds on an attachment.

(a) See *Burton v. Law*, 234. *House, Comy. Rep.* 264. *Stodd v. Ac-*
Say v. Ellis, 2. *Black. Rep.* 955. *Ano-*
nymous, 1. *Stra.* 479. *Field v. Work-*
Daws, post. 579.

Sutton the Marshal's Case.

Case 928.

HE had disturbed the steward of the prison, upon his coming into the office, supposing his right to have determined with the estate of the former marshal who put him in, and had but an estate for life in the office.

Whether the steward of the prison be an officer for life, not removable by the marshal, S. C. 6. Mod. 57. 91.

It was now moved by *BROTHERICK*, that he might be ruled to suffer him quiet, alledging that his estate was a fee, or at least for his own life, and not determinable by the estate of the grantor; and he compared it to the case of secondary of the court, who is put in by the *Chief Justice*, yet continues in after death or other determination of the office of *Chief Justice*.

HOLT, Chief Justice. The cases are not parallel, for by ancient custom of the court it is, that an under-officer's place of this court does not determine with that of *Chief Justice* who puts him in. And there is a vast difference between an office by custom only in the grant of a superior officer, and an office derived out of the interest of another; and the office of marshal of the king's bench is an office of inheritance, and the under-offices are derived out of it; and therefore if that office, that is an inheritance, be granted for life, all the under offices that are inferior to, and derived out of his estate, and in the gift of him that has the estate for life, are determinable upon his estate; and there can be no custom to the contrary, because the superior office being an inheritance could not stand in need of the support of a custom.

Q o 4

But

**SUTTON THE
MARSHAL'S
CASE.**

If tenant for life of the office of marshal grant an office for life, the surrender of his office shall not defeat the estate of the inferior officer.

But if tenant for life of the office of marshal grant such inferior office for life, and then surrender, that surrender shall not alter or destroy the estate of the grantee, because the grantor shall not by his act defeat his * grant; for that reason, if he forfeits his estate, yet the under-grantee shall continue in for life of the grantor: as if tenant for life make a lease for years, and then surrenders or forfeits his estate, yet the lease for years remains good during his life, if the years continue so long. And though the late marshal's place be determined by parliament (a), yet that shall not affect the under-officer; for it is for the marshal's own offence that he is turned out, which shall not prejudice his grantee: as if lord of a manor in fee grant to another the office of bailiff of his manor, and that he shall have certain fees arising from the execution of his office, he or his heir shall not turn him out. However, let us see precedents of grants of office of steward, how it was antiently granted.

And the matter being moved again,

PER CURIAM. The steward is not an officer attendant on the court, and therefore is not intitled to relief thus upon motion; and besides, if his office concern the safe keeping of prisoners, he cannot be imposed upon the marshal. *Et sic finit* (b).

(a) See statutes 8. & 9. Will. 3. c. 27. and 27. Geo. 2. c. 17. (b) See S. C. 6. Mod. 57. 91.

Case 929.

Anonymous.

PER CURIAM. If there be demurrer to part, and plea to issue to part, and judgment upon the demurrer before the issue tried, the plaintiff, if he please, may enter a *non prof.* upon the issue, and take a writ of enquiry of damages upon the judgment on demurrer, but it is not to be taken out till after *non prof.* entered on the other; for if they will proceed upon the issue, the jury that try it ought to enquire of the damages on the other: and here, because a writ of enquiry was taken out without entering of *non prof.* that matter was moved in bar of final judgment, and thereupon it was stayed till they moved of the other side.

Case 930.

Monger against Kett.

If one under pretence of being insolvent get an abatement of a debt, it will be set aside in equity.

S. C. 2. Eq. Abr. 479. 594.

NOTE: In the case of *Monger* and *Kett* in Chancery, it was held by the Court, that if there be two dealers, and one of them is very much indebted to the other; and in order to get an abatement from him, he makes him believe he is insolvent by absconding, sculking, or shutting up shop, whereby the other has just cause to fear the loss of his debt; and thereby procures a release or an abatement, when in truth the man was really solvent; that

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that Court would relieve against such release, &c. And this was agreed to have been often done, and the case of *Bonny v. Bonny* quoted for an instance; *scilicet* if the party had not just cause to fear the loss of his debt.

MORGER
against
KETT.

* [559]

* IT WAS ALSO THERE HELD; That if *A.* mortgage land to *B.* for one hundred pounds, and *A.* owes *B.* also one hundred pounds by contract or bond, *A.* shall be admitted to redeem the mortgage, without paying the one hundred pounds by the contract or bond, but is left to his remedy on his contract or bond; and hereupon POOLY at Bar said, that if I have several mortgages upon several lands, for one hundred pounds each from the said person, and one of the mortgages proves a bad title, and the other good, the mortgager shall redeem the good one without paying of the money upon the bad one.

If one owes money by mortgage, and also by bond, he shall redeem the mortgage without regard to the bond. *Quere.*

Anonymous.

Case 931.

IF one owes forty pounds by bond, for the payment of twenty at such a day, and twenty pounds by contract to the same person, payable at the same day; and at the day he pays twenty pounds, without telling for which it is, it shall be a payment in equity upon the bond, because that is most penal upon him.

Payment shall be taken on that which is most penal.

Anonymous.

Case 932.

HOLT, *Chief Justice.* If an overseer of the poor contract with tradesmen upon account of the poor, and upon his own credit, as soon as he receives so much of the poor's money, it becomes his own debt.

Overseer of the poor.

Anonymous.

Case 933.

HOLT, *Chief Justice.* Five justices of the peace are too many to join in an order for settling of a poor; for they may well make a majority at the sessions, and so confirm their own order.

Five justices should not join in order of sessions, on appeal.

Anonymous.

Case 934.

HOLT, *Chief Justice.* A render of principal in discharge of his bail is not an execution till *committitur* entered; for till then the plaintiff has his election, whether he will have him in execution or not; but if the *reddidit se* be in presence of plaintiff, and then he is committed, it shall be adjudged an execution. And a delivery to the tipstaff is a commitment to the marshal, for the marshal is supposed present in court.

Render of principal in discharge of bail is not an execution till *committitur* entered.

AND NOTE: In this action there must be a copy of the judgment and of the commitment given in evidence.

Anonymous.

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Cafe 935.

Anonymous.

Corporation is
not indistinct.

NOTE: *Per* HOLT, *Chief Justice*. A corporation is not indistinct, but the particular members of it are.

* [560]

Cafe 936.

* Anonymous.

Trustees not answerable for each other.

Bridg. 35.

Cro. Car. 312. 2. Vern. 515. 570. Salk. 318.

Trustees not to pay costs.

IN Chancery, *per* WRIGHT.

FIRST, If there be two trustees, one of them shall not answer for receipts by the other, but each is to answer for himself (a).

SECONDLY, Trustee ought not to pay costs where there is not default in him.

Bill dismissed for want of making remainder-man apart.

THIRDLY, Lands were devised in trust for two young ladies, and if they died within age, and before marriage, the remainder over; now the youngest being sixteen years old, and the other eighteen, they brought their bill for execution of the trust; but it was dismissed for want of making the remainder-man party.

Trustees having power to appoint agents, not answerable for them.

2. Fonth. Eq. 181.

FOURTHLY, If one devise to trustees, and by express clause therein gives them power to appoint agents to manage the land, and they appoint one then solvent and good, though afterwards he prove insolvent, they shall not answer for him; *secus* if he were not solvent at the time at which he was nominated. But if there were no such direction or power in the will, the trustees are bound to answer for their agents at all events: so in case of money to be laid out at interest.

(a) But see Attorney General v. Randall, 21. Vin. Abr. 534. Boardman v. Mosman, 1. Bro. Ch. Rep. 68. Sadler v.

Hobbs, 2. Bro. Ch. Rep. 116. Keble v. Thompson, 3. Bro. Ch. Rep. 112.

Cafe 937.

Anonymous.

Appeal lies from justices to sessions, in respect of overseers accounts.

PER CURIAM. Justices of peace are not absolute judges of the accounts of the overseers of the poor, but an appeal lies from them to the sessions, in case of overcharge or other wrong; but justices may audit the account of the overseer before the year be out; if not, in case he be turned out before that time (a).

(a) See 43. Eliz. c. 2. f. 3. & 4. the 17. Geo. 2. c. 38. f. 4. Rex v. Hedges, Salk. 533. the Whitechapel Case, 16. Vin. Abr. 417. Rex v. Bartlett, 2. Stra.

983. S. C. 1. Const. 264. Rex v. Whitcar, 3. Burr. 1365. and Mr. Const's ed. of Bott, 1. vol. page 261, &c.

Cafe 938.

Anonymous.

If notice of trial be countermanded, must pay costs.

IF upon notice of trial defendant draws breviats, retains Counsel and makes ready his witnesses, before that notice is countermanded, upon affidavit thereof, and motion, he shall have such costs as Master shall tax.

Anonymous.

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Anonymous.

Case 939.

IF judgment be irregularly obtained, a release of errors sets it right to all purposes. Release of errors.

Anonymous.

Case 940.

PER HOLT. One arrested by process of this Court, for want of bail, goes to custody of THE MARSHAL, and afterwards by *habeas corpus* gets himself turned over to THE FLEET; surely the plaintiff shall not thereby lose the benefit of declaring against him in custody of the marshal. But if he removes himself in that case out of custody of the sheriff into the Fleet, so that he never was in custody of THE MARSHAL, If one who for want of bail is turned over to the marshal gets himself turned over to the Fleet, he may be declared against as *custodit, per Holt.*

Quere, for there may be a difference; though even there it will be dangerous to suffer such removal to prejudice of the first plaintiff's action.

* [561]

* Anonymous.

Case 941.

NOTE: Before the late act of parliament (a), one in prison of THE FLEET could not be declared against, without bringing him by *habeas corpus* into court; but the course here was to leave a declaration with the turnkey. Proceeding against prisoners previous to 4. & 5. Will. & Mary, c. 21.

1. Lev. 1. 2. Mod. 306. 1. Will. 120. 2. Burr. 1051. 1. Term Rep. 191. Tidd's Practice, 168. 198.

(a) 4. & 5. Will. & Mary, c. 21.

Anonymous.

Case 942.

INDICTMENT for using a trade for three months, from such a day to such a day, not having served seven years, &c. Not guilty pleaded; and the defendant found guilty for one month, and acquitted of the rest. On an indictment on 5. Eliz. c. 4. for using a trade for three months, the defendant may be found guilty of using it one month.

IT WAS MOVED *in arrest of judgment*, That it was uncertain for which of the three months he was found guilty; and therefore the defendant could not plead this conviction in bar of another indictment for the same offence:

But PER CURIAM, He may plead a conviction for one month, ABSQUE HOC, that he was guilty in any other month.

And judgment was given for the king.

Anonymous.

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Case 943.

Anonymous.

A bill dismissed
may be pleaded
in bar.

IN chancery, if a bill be dismissed with costs, it is a good plea in bar to another bill for the same cause, without oath that the matters are the same, only Counsel's hand being to it.

A new defendant may be added to a bill in chancery.

And one may add a new defendant without paying costs, so that such addition does not make the other defendants to change their answer.

Case 944.

Sir Richard Leving *against* Lady Calvry.

Writ of error cannot be discontinued without leave of the Court; and if no error assigned, judgment will be affirmed.

S. C. Ld. Ray.
330. 695.
S. C. Comy.
Rep. 118.
2. Cromp. Pract.
367.

IN error, want of original was assigned for error, the original having been lost upon the death of the plaintiff below's attorney; upon affidavit of this fact THE LORD KEEPER granted them a new original, and that should be certified; and a *certiorari* being brought, and the original being certified, now the defendant in error would bring on the matter in order to have his judgment affirmed, and costs.

And now it was moved that this would be very hard upon the plaintiff, who at the time of the writ of error brought had good cause, though that were now cured by a new original; and for this the case of *Nayden v. Winterbotham*, about three years before, was cited.

But PER CURIAM, The plaintiff cannot discontinue his writ of error without leave of the Court; for if you do not assign error, we will affirm the judgment; and the Court would make no rule.

* [562]

Case 945:

* The King *against* Fitzgerald.

A defendant to an indictment for a misdemeanor may implead until the ensuing Term.

S. C. 1. Ld. Ray.
706.

FITZGERALD was bound by recognizance to appear here the first day of Term, and was called on, but did not appear; but came afterwards and entered his appearance with MR. HARCOURT, his clerk in court, and would implead till next Term; which THE ATTORNEY GENERAL did oppose, for that he ought only in this Term to implead to *Craffin. Animar*. And heretofore when one came in upon a recognizance, he must have pleaded *instantly*, so it was if he came in upon a *habeas corpus*, *reddidit se*, or *exigent*; but this was thought hard, and is remedied since the Revolution (a).

(a) It is said, S. C. Ld. 1. Ray. 706. that it was ruled by the advice of the Clerks that he ought to implead until next Term;

the same law if he comes in upon attachment; but upon *cepi* returned to a *causam* he shall plead *instantly*.

The

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The King against Young.

Cafe 946.

THIS case being moved again: *Per* HOLT, Chief Justice, To try the defendant in this court, there must be a *venire facias*, returnable at the common day, and fifteen days between the *teste* and return of it (a). And though the record of outlawry, and all the other proceedings against him, be in this court, yet by the statute of 6. Hen. 8. c. 6. (b) we may send them down to THE OLD BAILEY; but we could not send them a record of an indictment before that statute; and such cases have been sometimes tried at *nisi prius* (c). And he quoted the case of one Turner in my LORD HALE's time, who was brought hither from the OLD-BAILEY to reverse his outlawry; and the Court were clear for sending him back, if the prosecutor had not desired he should be tried here. And in all cases whatsoever, where the indictment happens to come hither, though it be not by *certiorari*, we may in our discretion send it back.

When an indictment comes into B. R. it may either be tried there, or sent back, as the Court thinks proper. Ante, p. 544. 545.

And so it was ruled here.

(a) 2. Roll. Abr. 626. 2. Hale, 260.
2. Inst. 368. 4. Hawk. P. C. ch. 41.
f. 3.

(b) 3. Hawk. P. C. ch. 3. f. 8.
(c) 4. Inst. 74. Ray. 364. 3. Hawk.
P. C. ch. 3. f. 7.

Nailor's Cafe.

Cafe 947.

NAILOR was a prisoner in THE COUNTER for want of bail, and a *ne exeat regnum* directed out of chancery to the sheriff of London, to hold him to security not to leave the kingdom without licence; and a *habeas corpus* being moved for, in order to charge him with an action in this court,

A person in custody on a *ne exeat regnum* may be brought into the court of king's bench by *habeas corpus*, and charged with an action. S. C. 1. Ld. Ray. 696. S. C. Holt, 494.

BROTHERICK objected, that he could not be turned over to THE MARSHAL, for then the sheriff of London could * not obey the mandate of the *ne exeat regnum*, viz. to detain in custody till he found sureties, &c. and he said the suggestion of that writ is, that the party has some ill design against the Government, and is not traversable; and to prevent his executing such design is the end of the writ; and some of them mention a sum certain that he is to find security in; others leave that matter to the sheriff, who, upon default of such sureties, is to carry him to the common gaol of the county, there to be safely kept till he voluntarily give such security; and this is to be certified by the sheriff into chancery: and there is no way to discharge this, but by a passport under the great or privy seal, or privy signet.

* [563]

HOLT, Chief Justice. Suppose he had been in the sheriff's custody, by a writ of this Court, at the time of the *ne exeat regnum* coming to him, as you would have it, he cannot be removed out of his custody; so that the writ would be a kind of a sanctuary to him. It is true, if the sheriff take the security, he ought to certify

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NAYLOR'S
CASE.

tify it into chancery; and it is true it is out of the sheriff's power, by the removal, to detain him, or take security; but we may keep him in our custody till he find security, and so there will be no mischief; but if we take it we may keep it here. And here the writ has no sum certain, and this writ is not an action as a *homine replegiando*; and all the sheriffs in England are officers to this Court; and it is very extraordinary when one is in prison for want of bail, to charge him with a *ne exeat regnum*, and it looks like a trick to prevent a *habeas corpus*.

But the *habeas corpus* was granted.

Cafe 948.

Vines against Doderidge.

A *modus* to pay two shillings in the pound on the yearly rent in lieu of all tithes is bad.
Bunb. 301.
Cro. Eliz. 71.
276.
1. Leon. 94.
3. Com. Dig.
"Disines"
(E. 15.)

PROHIBITION was moved for to stop a suit in THE SPIRITUAL COURT for tithes, upon a suggestion, that there was a *modus* to pay two shillings in the pound of yearly rent for all tithes.

HOLT, Chief Justice. A *modus* must be of something certain, that may be demanded in the spiritual court; and here, suppose the land be let out for a fine and five shillings rent, what becomes of the *modus*, or of the parson? And a custom cannot be laid in a rent, which is alterable at the pleasure of the parties; and besides, this custom would amount to a plain *non decimando*. Vide the great case in *Ro. Ab.* 378. to pay two shillings for all tithes. *Hob.* 192. And he said, * if the case of *Perkin v. Perkin* came in question again, he would desire to hear it argued, for he was not satisfied with the judgment of it.

• [564]

Cafe 949.

Anonymous.

Habeas corpus
returnable at a
day certain.

A PRISONER was brought up by *habeas corpus* returnable at a day certain, and the gaoler did not bring him into court, but carried him back, and brought him in the next day.

This being a writ returnable at a day certain, you cannot bring him in at another day by virtue of it. *Secus*, if the writ were returnable *immediate* (a).

And the gaoler was ruled to be at the charge of a new writ.

(a) 2. Burr. 777. Tidd's Pract. 167. The old rule of Court made Mich. Term 1654, directing the *habeas corpus* to be made returnable in court at a day certain in Te m, unless directed to the sheriffs of London or Middlesex, or unless it be to deliver over the defendant in discharge of

his bail, is fallen into disuse, and the writ is now made returnable before the Chief Justice at his chamber *immediate*, and should be returned in due and convenient time. 3. Burr. 1875. 1. Tidd's Pract. 169.

Turner

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Turner *against* Burnaby.

Cafe 950.

TWO attorneys at the tavern agreed each to name twenty-four to the sheriff, out of which he should return twenty-four to try an issue.

Attornies of each side may agree to name twenty-four persons, out of which sheriff may return twenty-four to try the issue. S. C. Holt, 266. 703.

AND PER CURIAM, If the sheriff will return a jury at the nomination of any person, it is a misdemeanor in him, and it may be maintenance in him at whose request it is done (a); but here it being by consent of attorneys of either side, *consensus tollit errorem*.

(a) See the statute 3. Geo. 2. c. 25. and Tidd's Practice, 514. for the manner of nominating a special jury: and 3. Geo. 2. c. 25. s. 15. for striking a jury on a trial at bar.

Anonymous (a).

Cafe 951.

IF a servant usually employed to pawn goods for his master, or to borrow money for him, borrow of me, or pawn his master's goods with me for money; I shall maintain debt against the master thereupon (b).

Debt lies against a master for money borrowed by his servant.

2. Lev. 172. 5. Mod. 398. 1. Stra. 506 3. Bac. Abr. 560.

SECONDLY, If my servant has a note for money due to me, or other goods, which in their nature are not properly in the custody of a servant, that is evidence *prima facie* that he has an authority from me to apply them to such use as he does afterwards put them; but the contrary may be given in evidence, as that he came by the note by undue means, or had it to another particular purpose.

A servant keeping his master's cash is presumptive evidence of his authority to apply it.

THIRDLY, If a man has a bill of exchange, he may authorize another to indorse his name upon it by parol; and when that is done, it is the same as if he had done it himself.

An indorsee may, by parol, authorize another to indorse his name

in it. Ante, 346. Kyd on Bills, 189.

FOURTHLY, If I pawn goods to A. for such a sum, A. may have debt for the money, notwithstanding his having a pawn.

The pawnee may have debt for the money advanced. Salk. 523.

Per HOLT, Chief Justice, omnia.

(a) At nisi prius, before HOLT, Chief Justice. Hughes v. Smith, 1. Will. 328. Fearn v. Harrison, 3. Term Rep. 757. 4. Term Rep. 177.

(b) Ward v. Evans, Salk. 442.

* [565]

Anonymous.

Cafe 952.

AT nisi prius, before HOLT, Chief Justice, this case happened: A. being indebted to B. gives him a note in a feigned name for the debt: afterwards * the wife of B. runs away with another man, and takes the note with her; A. pays the money to B.; the

One not to be witness where he may be interested. 1. Stra. 575.

2. Stra. 728. 1. Term Rep. 303. 3. Term Rep. 34. person

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Anonymous. person with whom the wife ran away sues *A.* for the money in the feigned name.

At the trial *B.* offered to make oath of all this ;

But was rejected by **HOLT, Chief Justice**, for it was to prove a right in himself to the money received from *A.* for which otherwife he was accountable to *A.*

Cafe 953.

Holden *against* Sutton.

Whether debt by executor for an escape of one in execution of a judgment of the testator in the *debet* and *detinet*, be helped by verdict.

DEBT by an executor for an escape of one in execution on a judgment of testator, and declared in the *debet* and *detinet* ;

And after verdict this moved in arrest of judgment. And it being doubted whether it was helped by the general words "of matters of like nature" in the statute of 16. & 17. *Car.* 2. to maintain it at another day, were quoted, 1. *Sid.* 379. 341. 2. *Keb.* 407. that is, that it was helped after verdict.

S. C. 1. *Ld Ray.* 698.
5. Co. 31.
1. *Lev.* 250, 251.
1. *Lev.* 130.

But **HOLT** said, that *debet* always is where the action is in the party's own right.

Et adj.

Cafe 954.

Anonymous.

Reference to a Master.

HOLT, Chief Justice. Upon a reference to **THE MASTER**, if upon service of a rule to attend him one of the parties will not attend, the course is to move the Court that **THE MASTER** may examine *ex parte*, and so make a report.

Cafe 955

Anonymous.

Surety of the peace.

1. *Lev.* 107.
2. *Lev.* 228.
Moer. 874.
Str. 473.

TO have security of peace of one, you must make affidavit of the cause of fear, and exhibit it in articles ; and then make affidavit that you demand this not of any ill will or malice, but out of fear of some bodily hurt.

2. *Hawk. P. C.* ch. 60. s. 6.

Cafe 956.

Anonymous.

Ant., p. 555.

BOND may be sealed with a wafer.

Cafe 957.

Anonymous.

Evidence.

COPY of a bill in chancery taken from file with Six Clerks, evidence.

Anonymous.

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Anonymous.

Case 958.

ONE cannot give evidence of anything done at a former trial without producing the record of the former trial (a).

Record must be produced.
Ante, 555.

(a) 2. Roll. Abr. 574. 9. Co. 30. Wharton, Palm. 524. Whitmore v. Co. Lit. 117. Bull. N. P. 230. Fof. Rooke, Sayer. 299. Hewson v. Brown, ter v. Cole, 1. Stra. 781. Biggs v. 2. Burr. 1024.

Anonymous.

Case 959.

PER HOLT, Chief Justice, at nisi prius. A. orders B. to receive money from C. for him. B. orders C. to pay the money to D. to whom B. owes money. C. accordingly does pay it. A. shall maintain an action against B. as for so much money received to his use. So if in that case B. had drawn a bill upon C. for the money, or generally for so much money, if C. has no effects of B. in his hands; his answering such bill is a payment of A.'s debt to B. for which A. may maintain his action against him.

Money received to the use of another.
1. Salk. 9.
2. Mod. 263.
Cowp. 565.
Doug. 137. 139.

* [566]

* Anonymous.

Case 960.

PER HOLT, Chief Justice. There never is a distribution ordered by the ecclesiastical court (a) but where the party dies intestate, or the will directs it; but chancery (b) does sometimes enforce a distribution where the will does not direct it.

Distribution in spiritual court and chancery.

(a) See 5. Mod. 247. 1. Ld. Ray. 2. Chan Cases, 95. 3. Peer. Wms. 99. 86. 363. 1. Brown C. C. 328.

2. Com. Dig. "Chancery" (3. D. 1.).

(b) See 2. Vent. 362. 1. Vern. 134.

Anonymous.

Case 961.

DEBT by husband; and it appearing to have become due to his wife as a separate dealer, a discourse of the wife's concerning it was given in evidence for the defendant (a), annuente HOLT.

Wife's conversation evidence against heron.

(a) But see contra the case of Bentley v. Cook, cited 2. Term Rep. 265. Davis v. Dinwody, 4. Term Rep 678. Anonymous, 1. Stra. 527. Williams v. Johnston, 1. Stra. 504. Kerlake v. Shepherd, Espinasse Dig. 722. Hill v. Hill, 2. Stra. 1094. Barker v. Dixie, B. R. H. 252.

Elizabeth Claxton's Case.

Case 962.

ELIZABETH CLAXTON was committed to the New Prison by Justice PERRY, there to remain till she found security for her good behaviour, for being taken in a disorderly house (a).

The being found in a disorderly house is not of itself sufficient cause to bind the party to her good behaviour.

Being brought up by habeas corpus, her Counsel moved for her discharge.

(a) See the statute 34. Edw. 3. c. 1. 4. Inst. 181. 2. Hawk. P. C. 7th edit. S. C. Holt, 406. ch. 61. f. 2.

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FIRST,

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ELIZABETH
CLAXTON'S
CASE.

FIRST, Because that being taken in a disorderly house was no reason to require sureties of the good behaviour: for that any honest person might accidentally be there, and know nothing of its being such a place.

Quod fuit concessum.

Commitment.

SECONDLY, 'I hat in case it were cause, yet the commitment is to an illegal gaol, viz. *The New Prison*.

A lewd woman
shall be sent to
the house of cor-
rection.

THIRDLY, That in case a woman's being taken in a disorderly house be reason to take her for a lewd woman, and so within the jurisdiction of a justice of peace by the 39. *Eliz. c. 4.* yet the way was to send her to the house of correction, but not to require sureties of the good behaviour of her.

A justice cannot
commit, or bind
a person to good
behaviour for
being found in a
bawdy-house,
unless he ad-
judges him to
be a disorderly
person.

11. Mod. 415.

HOLT, *Chief Justice*. It is not true to say, that every one that has not a visible way of living shall be liable to find sureties of the good behaviour. Indeed if one live extravagantly and high, who has no visible way of getting, it may be reasonable to inquire how he lives; but if a man live in a reasonable quiet manner, it is hard to hold him to it. But lewd and disorderly persons may be held to the *good behaviour*, or committed to *gaol*, or they may be sent to the *house of correction*. But what is it makes a lewd person? It is not being caught in a house of bawdry, or a disorderly house, at a seasonable time. And though a justice of peace may be a judge of who is a lewd and a disorderly person, and therefore if the commitment had said, that it had appeared to him that this person was such, we would have taken his word for it; yet when he assigns the reason of his judgment, and we find that reason will not maintain it, we are not to regard his judgment; and as persons of ill behaviour are to be punished, so great care is to be taken of the innocent.

* [567]

And being remanded, and brought up again at another day, several affidavits were read of her lewdness;

Whereupon THE COURT qualified the justice's commitment, and ordered a rule to be drawn for her commitment to THE MARSHAL thus: "Because it appears to us, that she is a lewd woman and a frequenter of bawdy-houses; *ideo* she is committed till she find sureties of good behaviour."

Constable may
commit lewd
women.

Poph. 208.

Latch. 173. 2. Hale, 97. 3. Hawk. P. C. ch. 13. s. 8.

And HOLT, *Chief Justice*, quoted 13. *Hen. 7. c. 10.* that a constable may commit lewd women till they find sureties, and neighbours are bound to assist.

Case 963.

Anonymous.

A common jury being returned instead of a special jury, is no cause for a new trial.—Vide postea in this Term, *Watson v. Sutton*.

After

Michaelmas Term, 13. Will. 3. In B. R.

After trial this was moved by the defendant for a new trial; ANOMOUS.

Which was denied, because he had made a defence; for since, if the verdict had gone for him, he would have had the advantage of it, it is fit he should submit to it, that it is gone against him; *secus* if he had not made a defence (a).

(a) In what cases and under what new trial, see Tidd's Practice, 604 to circumstances this Court will grant a 612.

Dundee against Petty.

Cafe 964.

ACAPIAS being returned against the principal, he brings error immediately, and the plaintiff brings debt upon the recognizance against the bail, and delivered a declaration as of the precedent Term.

MOUNTAGUE moved for an imparlance. He urged, that if the plaintiff had gone by way of *scire facias*, the bail might render the principal at any time before the second *scire facias*, returned. *Godlington v. Lee* (a). And there is no reason but the bail should have the like time in this case; and this he cannot do without the favour and assistance of the Court, for the recognizance being forfeited by the *non est inventus* returned upon the *capias*, a subsequent render of the principal cannot be pleaded in bar of the action.

After *capias* returned against the principal, the plaintiff may proceed against the bail, though there be a writ of error.

1. Burr 340.
Tidd's Pract. 144. 280.
2. Sura. 87a. 2270.

And THE COURT afterwards made a rule, there should be in this case eight days in full Term for the bail to render the principal.

And PER CURIAM, After *capias* returned against the principal, though writ of error be brought, yet the plaintiff may proceed against the bail; for the writ of error does not supersede the recognizance.

(a) Raym. 14.

* Hayward against Kinsey.

* [568]

Cafe 965.

ERROR of a judgment in the court of common pleas in an action on the case laid in London, wherein the plaintiff below declared, that the defendant's testator the fifth of March, in the fourth year of James the Second, was indebted to the plaintiff's intestate in forty pounds, money lent, &c. AND ALSO in the like sum of forty pounds on account, and promised payment, &c. The defendant pleads *non assumpsit infra sex annos*. Replication, That the plaintiff's intestate the eighth of May in the fourth year of James the Second, *suprad.* did sue out a *quare clausum fregit* against the defendant's testator in the common pleas, directed to the sheriff of Dorsetshire, with intent, upon the defendant's appearance thereunto, to declare against him *ex causa præd.* now in the declaration

An original in *clausum fregit* sued out in Dorsetshire above six years, and case thereon within six years in London, will not prevent statute of Limitations.

Michaelmas Term, 13. Will. 3. In B. R.

HAYWARD
against
KINSLEY.

set forth, but that he did not appear, but died the twelfth of April 1693; that the defendant was his executor; that the plaintiff's intestate *recenter postea*, viz. such a day, sued out another *quare clausum fregit* against the defendant, directed to the said sheriff of *Dorsetshire*, returnable such a day, with intent, upon the defendant's appearance thereunto, to declare against him *ex causa præd.* but the defendant did not appear; that afterwards, at such a time, the plaintiff's intestate died, and administration was committed to the plaintiff, who *recenter postea*, viz. the seventh of April 1697, about fifteen months after the administration committed, sued out the writ on which he now declared. Upon demurrer to the replication, judgment was for the plaintiff in the common pleas, of which this error is now brought.

Maxim.

Though personal action may be laid any where, yet if the cause of action appear to arise in another county, the venue will be changed.

NOW IT WAS ARGUED for the plaintiff in error, by CHESHIRE, that this original sued out in *Dorsetshire* did not serve, this action being laid in *London*; for it is a maxim, that *qualibet narratio super brevi locari debet in com. in quo breve emanavit*. And though the plaintiff in a personal action has election to lay his action in what county he will; yet that must be at the commencing of his action; for if it appear to the Court, that the cause of action did arise in another county, they will change the venue to that county; as if assault and battery be in *London*, the party may lay it in what county he pleases; but if he sue an original to the sheriff of *Middlesex*, and declare in *London*, it will be bad. *Cro. Jac.* 479. 674. In an *indebitatus* original was directed to the sheriff of *Devon*, and the action laid in *Exeter*, and for that, ill. *Cro. Car.* 272. That an original in one county cannot warrant an action in another county; and therefore * it shall be intended without original, which is helped by the statute. 1. *Cro.* 281. And *Moss* and *Bruerton's Case* (a), *Assumpsit* laid in *Norfolk*, non *assumpsit infra sex annos* pleaded; and an original taken out in *Suffolk* replied; and a judgment for the plaintiff in the common pleas reversed for this error. And it will not suffice to say this is the course of the court of common pleas, and the course of a court of *Westminster Hall* is the law of it, of which the other courts will take notice;

Where course of the Court is against law, it cannot prevail.

for there is a diversity when such course is directly against law, for then it cannot prevail; vide *Pettifer's Case* (b). And when such course is not against law, as by the course of that court there goes but one *scire facias*, though there be two here; but because the law does not require two, it is well; and surely to plead a *clausum fregit* in one county, which is a local action, to preserve a transitory action in another county, is a very illegal course.

Serjeant HOOPER, for the defendant in error, divided it into three points. FIRST, Whether this course of declaring in any action or county, upon the defendant's being brought in upon a general *clausum fregit*, be erroneous? SECONDLY, Whether, as

(a) Easter Term, 11. Will. 3.

(b) 5. Co. 32.

this

this case is, the writ lies for the defendant by *Journeys Accounts*?
THIRDLY, Though it should not be good by *Journeys Accounts*, whether, as it is, it suffice not to preserve the debt, notwithstanding the statute?

HATWARD
against
KINERT.

FIRST, And he argued, that since there is such a course in the common pleas for a plaintiff to bring a defendant in upon a *clausum fregit*, and then to declare against him in what county or in what action he pleased; and alledged on record that there is such a usage, and that confessed by demurrer; now this Court must take notice of it as the law of the Court; vide 1. Jo. 417. Cro. Car. 526, 527. contrary to *Pettifer's Case* (a). And the course of the Court is to be allowed for law; he quoted 1. Jo. 435. March, 59. *Lane's Case* (b); *Slade's Case* (c), great regard to multitude of precedents; *Wiscott's Case* (d). A common recovery of lands in *Wales* is suffered upon a *quod ei desorceat*, with a *protestando* to prosecute in the nature of a writ of entry in the *post*; and though a *quod ei desorceat* be properly when a particular tenant loseth by default, and is grounded upon a *tort*, and the other writ upon a right; yet will they not reverse such judgment for error. 1. Jo. 381. Cro. Car. 414. Upon an *audita querela* sued out in chancery, the party finds bail, who bind themselves in a recognizance, that the plaintiff shall appear *et stabit juri in ea parte*. And in a *scire facias* brought thereupon, the breach* assigned was, that the party did not pay the condemnation, or go to gaol; and though that be not mentioned in the recognizance, yet because the course of chancery is to take them in that manner, the Court will take notice of it. 2. Cro. 67, 68. And the *Case of Bruerton* cited of the other side differs from this. For, FIRST, both the writ and declaration were in case; so that it was plain the writ appeared to have been designed for the original in that action, and therefore variant and void; but here this writ shewn is a *clausum fregit*, and the count is in case. SECONDLY, This usage of the common pleas was not there averred, as it is here, and so confessed by the demurrer; and he relied upon 1. Jo. 312, 313. 1. Cro. 294. The statute of Limitation was pleaded to a debt upon an *assumpsit*; the plaintiff replied, that at such a time within the six years he sued out an original against the defendant to the sheriff of *H.* and that thereupon the defendant was outlawed; and that after such a time the outlawry was reversed; and that within a year after he sued the writ, on which the now action is founded against the defendant, into *Suffolk*, and avers them to be for the same cause; and a demurrer; and though the Court held there had been a variance between the first and second action, yet because they were averred to be for the same cause, and that confessed by the demurrer, the plaintiff had judgment. Vide 1. Sid. 328. That this is a course which has now obtained

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(a) 5. Co. 32.

(b) Smith v. Lane, 2. Co. 16.

(c) 4. Co. 92.

(d) 2. Co. 60.

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HAYWARD in the common pleas. *Vide 2. Vent. 193. 259.* But NOTE: *against* There is no judgment in either case.
KINSEY.

Whether the writ be well by *Journeys Accounts.*

Journeys Accounts will lie where abates by act of God; *aliter* where by act of the party.

• [571]

SECONDLY, Whether the writ be well by *Journeys Accounts*; and he agreed the opinion in 6. Co. 10. was against him; for there it is said to lie in no case but between the same parties, and neither for nor against executor or administrator; but he said this was no resolution, for it was no point in question in the case; and though Coke quotes many authorities for it, yet none of them does warrant it; but the reason of the law, as well as authorities, seem against him. 10. *Edw. 3.* 490. is there quoted in point, and there is no such folio in any Book, new or old, of that king, and all the other cases concern only the affirmative part of the proposition, that where there are more plaintiffs or defendants than one, and one of them dies, it lies; and *F. N. B.* 32. is against him. 1. *Edw. 3.* 17. 8. *Hen. 5.* 6. In a *quare impedit* the defendant died, and a new writ purchased *per Journeys Accounts*, and the diversity there taken, where it is abated by the act of God, and where by the act of the party; where it is by the act of God, it will lie; otherwise * where it is by the act of the party; and surely these are rather against my Lord Coke than for him: and the reason of *Spencer's Case* is also against this opinion; for there it is held, in case of any default in the clerk, as false *Latin*, variance, want of form, &c. whereby the writ abates, the plaintiff shall have a new writ *per Journeys Accounts*. And so in some cases even where there is some default in the plaintiff; as if it abates for non-tenure of parcel, that is when more is demanded than the tenant holds, or when it abates for jointenancy with another in the defendant; for it is hard, says the Book, the plaintiff should suffer for not taking notice of what lies not properly in his conscience; yet these are things which by diligence and means might be found out; and to say that he should have *Journeys Accounts* there, where he might possibly prevent his writ's being abated by finding out the quantity of the land in the defendant's tenure, or the quality of his estate, and not where his writ abates merely by death, the irresistible act of God, would surely be against all reason. And if this writ did not lie against the heir, he might alien before action brought; and executors would avoid just debts, as here. *Br. Quare Imp.* is flat against me, but the Book which he abridges is for me.

THIRDLY, All these cases were before the statute of Limitations; and therefore since the statute has limited the plaintiff in time to claim his right, if a writ abated by the act of God would not be capable of reviving, and so brought out of the statute, it would be extremely mischievous; and he quoted the case of one *Thoroughgood* in the common pleas, *Trinity Term, 8. Will. 3. Roll 370.* where an executor *durante minoritate* brought an *assumpsit*, and pending it the infant came of age, and brought a new writ *recenter*, to which *non assumpsit infra sex annos* was pleaded, and this matter set forth in the replication, and judgment

for the plaintiff; and the statute never meant to bar a right where there are no laches in the plaintiff, as here there are none; where the action brought in due time determined by the act of God. And this is the reason of the proviso in the statute of Fines, which indeed is for caution, and not of necessity. *Cro. Eliz.* 219. 1. *Leo.* 297. 1. *And.* 264. If infant enters within five years after a fine, he shall avoid it for ever. So if he enter before he comes of age, though that be out of the words of the proviso. So if one be outlawed, within six years afterwards he reverse it, and then after the six years a new writ is brought, the statute is no plea. 1. *Sid.* 228. * Action begun in an inferior court, and removed up by *habeas corpus*, you begin upon it here above, and so prevent the statute. 2. *Inft.* 519. 1. *Sid.* 53. *Latitat* in this court prevents the statute of Limitations, but the continuances must be entered, which may be done by an attorney in his chamber; and he concluded, that the course of one of the courts of *Westminster Hall* is the greatest evidence of the law that can be, and greater than any Book-Case.

HAYWARD
against
KINSEY.

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Latitat in B. R.
prevents the sta-
tute of Limita-
tions.

HOLT, *Chief Justice.* You say that it is the course of the Court time out of mind; the question is, Whether that must be granted, or, if it be contradicted, how it shall be tried? It cannot be by jury; therefore alledging or not alledging it is not material; for if it be the course of the court, it is matter of law, of which we, as Judges, must take notice. Such a way has obtained; but the question is, Whether such a course has efficacy enough to be a good ground for a declaration? And suppose, when the defendant comes in and puts in bail, he demands *oyer* of the original; do you think it will be enough to give him *oyer* of the *clausum fregit*? And as to the *Journeys Accounts*, the plaintiff's intestate brings an action within six years, and it is proceeded, and pending it the plaintiff dies, and the six years are elapsed in the *interim*, it were reasonable that the administrator might have another action within convenient time, and have benefit of the first action for the preservation of the right against the statute, as the practice has been in cases of outlawry. But if an heir in tail bring a *formedon* within five years after a fine levied by a third person, who is not his ancestor in tail, but a discontinuee for the purpose, and pending it, and after the five years, *Vide s. Vene.* the issue dies, whether the next heir in tail shall have benefit of this *formedon*, by bringing a new one in convenient time? It were reasonable he should, but that has not been determined. And it is plain *Journeys Accounts* will not lie in this case, for the rule is, that it must be between those that were parties to the first writ. And besides, the new writ is to be the same with the forme; and the writ that lay for the ancestor, or for the testator, is not the same that lies for the issue or executor, but one of another nature. If an assise be brought within twenty years after a disseisin, and before judgment twenty years pass, and then the demandant dies, the heir cannot have another assise, but he must have a writ of

*Journeys Ac-
counts* must be
between parties
to the first writ.

HAYWARD
against
KINSEY.

* [573]

Actual entry
must be to pre-
vent statute of
Limitations.

Vide 1. Vent.
42.
1. Saund. 319.
1. Mod. 10.
2. Keb. 555.

If intestate dies
within six years,
and administrator
had time to
bring action
within six years
and does not,
statute will in-
cur.

Custom alledged
that carrier shall
safely keep
goods, is not
triable, for it is
the common
law.

entry; and it will be hard to prove the heir can proceed by *Journeys Accounts* in that case; for it is * another writ he is intituled to now by the death of his ancestor; yet still he may be out of the statute of Limitations. To deliver a declaration in ejectment is the course of this court; and it was thought by some, that if a declaration had been delivered within twenty years, that would tantamount to an entry; but it is quite otherwise; for though a declaration be delivered within twenty years, and a trial, whereby there is lease, entry and ouster, confessed; yet that will not amount to an entry, to bring it out of the statute of Limitations, though an entry be actually confessed; for it must be an actual entry, though an ejectment be a customary way of proceeding. And this has been so adjudged. And if a thing be laid by way of prescription, which does not lie in prescription, and it be demurred unto, that does not confess it; for if this be a course of the court, it is law; and if it be law, we are to take notice of it. If one says that he was seised of a manor, and that he, and all those whose estate he has therein, had a court-baron, that would be a void prescription; because a court-baron is incident to a manor of course; and this is the reason of *Lane's Case*; and a lease by the Chequer is a permanent interest. And suppose the intestate, after the action brought, had died within the six years, so as the administrator had convenient time to bring the action within the six years, and that he does not do, but brings it after the six years, that will not help him. So it seems in that case, not bringing the action within the six years would be a *devastavit*. And though in 2. *Rich. 3. 9. b.* the course of the common pleas be pleaded, yet that need not be; and it is like laying the custom of *England* in charging a carrier or inn-keeper for goods neglected or stole from them; which custom, though alledged, yet is not triable, but is the common law, of which the Court must take notice; and if in that case a custom were laid, that a carrier or inn-keeper ought to keep the goods as their own, it would be ill; for there is no such custom; and to plead what one need not plead would be folly.

NOTE: This was in *Trinity Term* last, and the case being argued again this Term, it was urged for the plaintiff in error, by *BRODERICK*, that the original in *Dorsetshire* could not preserve this right; for that a writ in one county could not maintain a declaration in another county; and for that were quoted 2. *Cro. 654. Palm. 492. 2. Rol. Abr. 382. 2. Cro. 664.* And a variance between the name of a place in the writ and declaration fatal, notwithstanding the statute 18. *Eliz. c. 14.* And the true difference is * between the want of an original, for that is helped by the statute, and a vicious original, which is not helped.

* [574]

Want of origi-
nal is helped by
the statute, a
vicious one is
not.

OBJECTION. This writ is only to bring him in, and then the party may declare against him in *custodiâ* of the warden of the *Fleet*; and this by course of the court; as well as in the *King's Bench*, one is declared against in *custodiâ marescalli*.

ANSWER.

Michaelmas Term, 13. Will. 3. In B. R.

ANSWER. No course of a court can prevail against the express words of an act of parliament; and the words of the statute are, "except suit be prosecuted and commenced within six years after the promise, &c." and that must be unless something be in court on which a judgment can be grounded. By this practice I may deliver several declarations upon one original, and in the same Term, and in several sorts of actions, as debt, detinue, case, &c.: besides, the very court of common pleas have declared it a late practice, and doubted of the legality of it. 2. Vent. 259. 194. Then to say they sued it *ea intentione*, how shall that be tried? or shall it be intended it was purchased to prosecute this individual action? Indeed sometimes upon another fact put in issue jury shall try the intent collaterally, as in case of murder; but that cannot be so here: *sciens canem ad mordend. oves affect.* is not traversable. Owen, 128. 3. Cro. 738. Issue taken, that one was *expers in legibus* bad, because not triable. 1. Cro. 330. Clerk of the hamper declared that he sued an attachment of privilege out of chancery *ea intentione*, that the defendant should put in bail to answer debt upon a bond; and held it would not do, though petit-bag side be a court of record, of whose course the other courts of Westminster ought to take notice; and it was compared here to the case in Yelv. 42. 2. Cro. 67. where a course in chancery, founded on many precedents, to take one up by *capias* on a recognizance on petit-bag side, was adjudged illegal; which proves that such course of courts as must be taken notice of by other courts, must be according to law. Hob. 270. Precedents of a court, as well as the law of a court, are founded upon reason, and *tantum habent de lege quantum habent de justitia*. 5. Edw. 4. 115. Dyer, 105. 4. Inst. 86. What is against law and statute of the realm, cannot be made good by precedents or prescription.

HAYWARD
against
KINSEY.

Sciens is not traversable.

Course of courts to be taken notice of, must be according to law.

As to the bringing this writ by *Journeys Accounts*, it is plain it cannot be, for no such writ can be but where the first writ is returned; for the time of its abatement ought to appear to the Court, that they may thereby see whether the second writ be sued out in convenient time. 14. Hen. 6. 7. 6. Co. 10. b. 9. Edw. 4. 6. If one be nonsuited upon the first, * he never shall have another writ *per Journeys Accounts*. Fitz. Journ. Acc. 13. 16. Hugh. Ab. 177. It must be purchased in reasonable time, and fifteen days was the time allowed by common law; but if it were a case where an attorney might be, there must have been longer time, because he must give notice to his principal of the abatement of the writ; and surely if *Journeys Accounts* would lie here, to bring the new writ fifteen months after the abatement of the first writ, would be too stale a prosecution; but the Judges, upon examination of circumstances, are judges of reasonable time. And the design of the statute of Limitation was to prevent perjury, which was frequently committed by suffering parol evidence of agreement after six years. Ray. 417. 107.

Journeys Accounts cannot be but where the first writ is returned.

* [575]

PRATT,

Michaelmas Term, 13. Will. 3. In B. R.

HAYWARD
against
KINSEY.

PRATT, *Serjeant, contra.* FIRST, It appears the original *quare clausum fregit* was taken out within the six years. SECONDLY, That it was *ea intentione* to declare in this action, for that is confessed by the demurrer; so the question first will be, Whether the defendant might be brought into court by a *clausum fregit*, and declared against in another action? We do not pretend to prove that an original in trespass will maintain a declaration in case, but that when a defendant has appeared in trespass, we may declare against him in case; and the only use we would make of the original in trespass, is to bring him into court, and then file a new original against him, on which we would declare; and if this course be for the ease and advancement of justice, it cannot be against reason or law, for justice ought to be had with ease. And to put a poor plaintiff to the charge of a special original, before he is sure of getting a defendant to appear, would be a hardship upon him, and therefore a difficulty of justice. And that such course is not against any rule of law, appears from the like course's being allowed in this court, where one is brought in by a *latitat*, which in strictness is not in the nature of an original to the action, but the declaration is it; and there is no doubt of the legality of such proceedings here. And if this course in the common pleas be grounded upon the like reason and conveniency, why should it be questioned?

3. Vent. 28.

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Now, whether there be such a course in the common pleas, if there be occasion, will be certified by the Judges of that court, who are to be presumed to be best conversant of their own customs; and by their judgment in this case they have shewed there is such a custom. Nor is it * necessary this course should be according to the general rule of the common law; for it is said in the cases that treat of the courses of courts, that the Judges ought to take judicial knowledge of such courses, which would be an absurd saying if they were according to the common law; for it were to tell them they must take notice of the common law; nay such course may be contrary to the common law, as *Lane's Case*, 2. Co. is: for it is a known rule of the common law, that no land can be conveyed to or from the king, but under the great seal; yet there it is held that crown land may be granted under Chequer seal, by the course of that court; and that by the word "*committimus*," a term not known to have any such force by the general rules of the common law. And the reason given for that judgment will hold in our case, *viz.* the great inconveniency that would ensue by defeating the interest of many farmers. And here many judgments there be in the common pleas grounded upon this course, which may all be reversed as well as this now in question; and for avoiding of such inconveniency, many precedents not maintainable in strictness of law are allowed, lest the property of the subject should be made precarious.

And as to the *Journeys Accounts*, an action brought within due time abates by the act of God, *viz.* death of party; and another is brought, which though in strictness it cannot be called the

the same action, because it is not between the same parties, yet in consideration of law may be well said *quodammodo* between the same parties, and the very case where *Journeys Accounts* is allowable; where a writ abates by the act of God, though it be between the same parties, yet it cannot in strictness be called the same action, for the first action is abated. If the first writ abate through the fault of the plaintiff, there shall not be a new one by *Journeys Accounts*; but there shall where it abates by fault of the clerk. And though it be said in 6. Co. . . that it lies not for heir or executor, because not party to the first writ; yet surely that opinion is not to be maintained by reason, to say, that when a writ abates by the fault of the clerk he shall have a new writ, and not when it abates by the act of God. And the law, which is *summa ratio*, shall never punish one with the loss of his right, when there is no default in him, especially since the writ of *Journeys Accounts* is grounded upon natural reason, and not upon any positive law; and though the party himself be dead, yet his right survives to his administrator. If a man bind himself* and his heir by bond, and die, leaving land in fee to the heir; obligor takes out a writ and then dies, and afterwards the heir aliens, it would be hard if the executor shall not revive this writ, and bind the land. And it were absurd to say the common law should be without remedy against these inconveniencies.

HAYWARD
agst
KINSEY.

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Here is but my *Lord Coke's* single opinion against us: since it is attended with such inconveniencies, it well becomes this Court to correct it; and *Coke* does not report it as the opinion of the Court, for the writ in his case was brought by the same demandant that brought the first writ; so there was no question of this point, and the authorities cited do not at all warrant this opinion. And 9. *Edw.* 3. 16. is against him; for there a writ was maintained, after great debate, by a successor of a prior by *Journeys Accounts*, and it was not so much as objected that they were not the same parties. And many authorities are quoted by my *Lord Coke*, where the first writ was by several plaintiffs, or against several defendants, and a new writ brought by *Journeys Accounts*; and yet they are not the same parties, for some are dead.

OBJECTION. *Clausum fregit* in its nature cannot be continued against an executor; but I answer, That since the only use we would make of it, is to bring the defendant in to answer, it will be favoured to hinder the statute from running upon us, to the destruction of a just debt.

And the design of the statute was to suppress old rights, where the party did not prosecute his right in convenient time, which was fixed to six years, and not to extinguish a right where there was no default in the plaintiff: and that this was the intent of the statute appears from the proviso for the saving the rights of infants, persons beyond sea, &c. in whom there could be no laches, because of their disability. And here we shew ourselves under as
great

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HATWARD
against
KINSEY.

* [578]

great a disability; we are intitled to the benefit of the proviso. If a man bring an action in an inferior court within the six years, and after the six years it is by *hab. corp.* removed hither, there must be new bail and a new declaration here above; so in strictness here is a new proceeding here above, yet the commencing below prevents the statute's being pleaded to the declaration *de novo* above. 1. *Sid.* 238. If a new promise be made within six years, the action and right is thereby saved, though the original contract be long before, which is the ground of the suit; so if the defendant do but own the debt within six years, it is evidence * of a new promise. So in all the cases, which are not within the mischief of the statute, the Judges have made a favourable construction in aid of creditors.

Demurrer confesses nothing but what is materially alleged.

BRODERICK replied, that a demurrer could confess nothing but what was materially alleged; and it cannot be averred that *ea intentione, &c.* the writ was purchased. And as to *Coke's* opinion concerning *Journeys Accounts*, he quoted further *Br. Journ. Acc.* 23. *Quar. Imp.* 150. *F. N. B.* 32. c. . And at common law a *clausum fregit* did not lie against an executor, but is given by the statute of *Edward the Third*; and they would have a process by act of parliament continued by common law; and in the case of the *habeas corpus* the bail below are not discharged till new bail be put in here.

The practice of every court must be taken notice of.

HOLT, *Chief Justice*. We are bound *ex officio* to take notice of the practice of every court in *Westminster Hall*, let us be informed which way we can: the rule of a court is one thing, and an established practice, of which one shall have avail without pleading, is another thing; and it is not the Judges of that court's saying, that it is the course of the court will determine it. Suppose you had pleaded a right, and a proper original in this manner that you have done here, you have not shewed that it ever was returned, and till return there is no day in court; and there is no continuance shewn to have been entered; and to prevent the statute it is not enough to take out a writ, even a proper one, but all the continuances, though for six or seven years, must be entered, and so shewn to the Court; for if there be but an omission of one continuance, it spoils all. Indeed where one pleads in abatement another action depending *ex eadem causa*, he need not plead all the continuances, but yet he must shew the action is not determined.

But PER LUY, In this case it is not enough to say it was continued, but it must be shewn how.

But GOULD, *Justice*, thought it would be well only to alledge a continuance generally; but agreed, that if a continuance be not alledged, it shall be intended a discontinuance, for it is so of course; and for that cause the judgment was reversed, but the Court would deliver no positive opinion upon the other points.

But

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But HOLT, *Chief Justice*, with some vehemence asked PRATT, how an original in *Dorsetshire* could be a foundation for a declaration in *London*? and said a *Journeys Account* was a common-law writ; and though a *Journeys Account* properly did not lie here, being not between the same parties: And it were hard not to allow a revivor of the first writ now in such cases as this, and that by consequence of law * upon the statute of Limitation.

HAYWARD
against
KINSEY.

* [579]

But for the discontinuance only was judgment reversed.

The King *against* Daws.

Case 966.

THE DEFENDANT being sheriff, and having taken up a man upon an attachment (a), took a bail-bond from a sufficient bail for his appearance.

Sheriff cannot oblige a person to take assignment of a bail-bond taken on an attachment.

It was moved by RAYMOND, that the prosecutor should be compelled to take an assignment of the bail-bond; and this he said was frequently granted in the common pleas, where oblige was a sufficient person.

S. C. Salk. 608.
S. C. 1. Ld. Ray.
722.
10. Co. 93. 175.
Ante, 447.

But THE COURT denied the motion (b).

(a) It was an attachment out of the court of king's bench against the defendant for a contempt. S. C. 1. Ld. Ray. 722.

234. Say v. Ellis, 2. Black. Rep. 955. But all the Judges are said to have resolved, on consideration, that a sheriff cannot take bail on an attachment for a contempt, Anonymous, 1. Stra. 479. Field v. Workhouse, Comy. Rep. 264. Studd v. Acton, 1. H. Bl. Rep. 468.

(b) The sheriff may take bail on an attachment of privilege, on, an attachment upon a prohibition, and on attachment in process. Burton v. Law, Stiles,

Anonymous.

Case 967.

NOTE. A copy of a charter under THE GREAT SEAL cannot be given in evidence, but a copy of the record thereof under THE GREAT SEAL may.

Copy of charter under THE GREAT SEAL no evidence.

10. Co. 93. Say. Rep. 297. Bull. N. P. 226, 227. 2. Lev. 108.

Anonymous.

Case 968.

THE PLAINTIFF proceeded against the principal and bail; and the principal ordered an attorney to appear for them both; and though the bail complained against this, yet THE COURT would not relieve him, but bid him proceed against the principal, especially the attorney, being able to answer damages.

Plaintiff orders attorney to appear for principal and bail

Anonymous.

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Cafe 969.

Anonymous.

Venue not
changed in
debt.

THE COURT never changes *venue* in debt (a).

2. Stra. 875. 2. Term Rep. 275.

(a) That the Court will not change the *venue* in an action of debt on bond, except on special grounds, see 1. Sid. 87. 2. Stra. 878. 1. Term Rep. 711. 1. Tidd's Practice, 3.

Cafe 970.

Cudmore *against* Ellis.

Statute of Li-
mitations not
pleadable to a
current account.

THE STATUTE of Limitation is not pleadable where there was a current account; but if it were a *stated account* above is years ago, it is pleadable to it (a).

Cases Ch. 152. 2. Vezey, 400. 1. Mod. 70. 2. Mod. 312. 2. Ld. Ray. 838. 2. Burr. 1251.

Common bail is
sufficient where
the action is
misconceived.

In account common bail suffices.

And *per* HOLT, Chief Justice, When, upon contest about common or special bail, it appears that the plaintiff has misconceived his action, and that if any action lies, it is of another sort; there common bail ought to be accepted.

(a) Coles v. Harris, Elpin. Dig. 148. Bull. N. P. 149.

Cafe 971.

Jonson *against* Meers.

What comes af-
ter *scilicet*, if re-
pugnant, may be
rejected.

IN this case IT WAS RESOLVED, where a *scilicet* comes, and the matter had been well without alledging what comes after the *scilicet*, there, if what comes after it be repugnant to what comes before, it shall be rejected. As here an * agreement was between the plaintiff and defendant, that the defendant should send him so much of the best indigo by the first ship that should come within two months after his arrival at *Jamaica*, and, in alledging breach, it was laid that such a ship came from thence within two months, *scilicet* such a day, which day is after the two months; there what comes after the *scilicet*, being unnecessary, and also repugnant, it shall be rejected. So in ejectment, if one declares of a lease made such a day, and that *postea*, *scilicet* such a day, which in truth is before the day mentioned in the lease (a).

Cro Jac. 96.

"Price" and
"market price"
are the same.

SECONDLY, That "price" and "market price" of a thing is the same; for that is the price of anything for which it can be sold.

(a) 2. Roll. Rep. 153. 2. Vent. 174. Yelv. 182. Cro. Jac. 154. 662. Cro. Eliz. 666. Salk. 325. Run. Eject. 218.

Cafe 972.

Warner *against* Green.

Excommunica-
tion pleaded in
abatement, must
only be *quous-*
que.—S. C. 1. Ld. Ray. 701.

EXCOMMUNICATION in plaintiff was pleaded in abatement, with conclusion of "*petit judicium, &c. et quod de-*" *fendens eat inde sine die*" absolutely.

And

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And a *respondeas ouster* awarded for two reasons: FIRST, For the conclusion ought to be "*sine die quousque* plaintiff were absolved;" for upon absolution he should have a re-summons. SECONDLY, For not having a certificate of the excommunication (a). *Vide Litt.* 5. 201. 9. Co. 41. 8. Co. 62. 67. 2. Cro. 82.

WARNER
against
GREEN.

(a) *Lutw.* 19.

Chancey against Win and Others.

Case 973.

IN TRESPASS against three, for taking so many bushels of salt. The defendants justified as commissioners appointed according to the statute 10. & 11. Will. 3. c. 22. s. 10. prohibiting the exportation of any rock or white salt, without first weighing the same before the commissioners; and the salt in question was put on board a hoy, &c. *fore deliberand.* into such a ship in *Hibern. exportand.*; the plaintiff replied *de injuriâ suâ propriâ absque tali causâ.*

De injuriâ suâ propriâ a good replication to a justification under a statute.

S. C. Holt, 409.
S. C. Salk, 628.
S. C. 1. Ld. Ray, 700.
8. Co. 67.

WARD objected, this general traverse was ill according to the rules of *Crogate's Case* (a); for one of the rules there is, that where the defendant claims an interest in the thing, or where he justifies as servant to another, there a general traverse of *absque tali causâ* is not good: For when the defendant claims a right, the plaintiff cannot aver that he is a wrong-doer without traversing the right; but where the defendant claims no right, but only pleads matter of excuse, without which he would be plainly a wrong-doer, there it suffices for the plaintiff to maintain the wrong; and in such case *de injuriâ suâ propriâ absque tali causâ* generally is a good replication. The second rule there is, that it cannot be when a matter of record is pleaded, for that were to put matter of fact and of record in issue. THIRDLY, It is not good when the defendant justifies by authority in law, for that were to involve multiplicity of facts in one issue, when every issue ought to be single and particular. And our case is within all these rules. FIRST, Two of the defendants justify as servants to the third, and so in his right and as his servants. And SECONDLY, The other justifies as servant to the commissioners of excise, and by an authority derived from them. THIRDLY, This is a justification under an act of parliament, which is an authority in law. And for these rules he further quoted 1. *Roll. Rep.* 47. *Hil.* 6. Will. 3. *Roll* 1819. 2. *Keb.* 266. *Cro. Eliz.* 539. 2. *Roll. Abr.* 694. and also the proviso in the statute of 23. *Hen.* 8. c. 5. of Sewers; where one upon not guilty may give warrant of commissioners of sewers in evidence; and the proviso is, that the plaintiff may give evidence of *de injuriâ suâ propriâ.*

1. *Lev.* 307.
2. *Lev.* 111.
3. *Lev.* 48.
4. *Leon.* 16.
2. *Mod.* 68.
Com. Dig.
"Pleader"
(F. 18.).

* [581]

(a) 8. Co. 67.

EYRES,

Michaelmas Term, 13. Will. 3. In B. R.

CHANCERY
against
WIN
AND OTHERS.

EYRES, *contra*. First, He agreed the general rule, that when the plea consists of a justification, part depending of matter of record, the replication ought to be with a special traverse; but that rule has its exceptions; for it matter of record be made use of by way of inducement to the part of justification, there it is not necessary to reply specially, 2. *Leo*. 102. And that the act of parliament here was mentioned by way of inducement appears, for if it had not been at all mentioned, the plea had been as well; for being a general law, the Court would have taken notice of it. And here the act is not left to the consideration of the jury, nor is it involved in the issue; and the sole reason why such a general replication is naught is, that the *lay gens* should not be inveigled by having matter of record involved in the issue. And here the issue is not pregnant with any matter of law, as whether there be such an act of parliament; but the sole question is, whether the fact were weighed or not? Secondly, That general rule only holds place where such matter of record is pleaded, to which the plaintiff may have an answer; as to a *scire facias*, &c. but here there can be no answer to the act of parliament.

Vide 2. Saund.
294, 295.
1. Lev. 307.

* [582]

And he agreed, That where one claims common by prescription, rent by grant, goods by sale, &c. and so justifies, as having interest, there the plaintiff must answer * directly to the title, and not with a general *de injuriâ suâ propriâ absque tali causâ*; but when one entitles himself by act of parliament, especially a general act, which none can traverse, there he may well reply *de injuriâ suâ propriâ absque tali causâ*.

And as to the rule, that where one justifies by virtue of an authority in law, *de injuriâ suâ propriâ absque tali causâ*, he said the authorities cited there did not warrant it, and denied it to be law; and the case that most seems to favour that opinion is that in the Year-Book of *Edward the Fourth*, where the defendant justified the entering to see waste; but there was a statute merchant pleaded in that case, which is matter of record; and also *Littleton* gives another reason why the plea was bad, *viz.* the traversing the intent of seeing waste; which was not traversable; but he quoted 16: *Hen. 7. 2.* where one justified by process of *witbernem*, and the general traverse of *absque tali causâ* was good. And he said the third resolution in *Crigate's Case* did contradict the first; vide 2. *Rol. 40. 694.* Defendant justified cutting of leather, as a searcher appointed by an act of parliament. *Ray. 50. Co. Ent. 643.* A justification under the stat. *de malefactoribus in parvis*, and *de injuriâ suâ propriâ absque tali causâ* replied.

HOLT, *Chief Justice*. If in trespass against a constable he justifies for that he was a constable, and the plaintiff was breaking the peace, for which he committed him; may not the plaintiff reply, *de injuriâ suâ propriâ absque tali causâ*? So if one come into my house, by my consent, and he will not go away when I would have him go, I may by authority in law turn him out; if he brings trespass for this, and I set out all the matter specially in my

Vide Yelv. 157.
2. Cro. 224, 598,
599.
2. Saund. 294,
295.

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my justification, *de injuriâ suâ propriâ* generally will be a good plea; and the case of entering to see waste is upon a special reason; for suppose the plaintiff were seised in fee, the pleading *de injuriâ suâ propriâ* would involve the seisin in fee in the issue, which would be hard to have the right of the fee tried in an issue in trespass. If the plaintiff were lessee, the lessor might lawfully enter to see waste; and there to make him a trespasser, the lessee ought to shew some misbehaviour in him, as cutting a tree, destroying the corn, or staying on the land all night, &c. And there is such a precedent in the Entries, as you say, of the statute of *Malefactoribus*; but when one justifies by virtue of a warrant of a justice of peace, it is quite another thing, because perhaps it may not be proper to involve the warrant in the issue. And the act of parliament here, if it had not been pleaded, would have been taken notice of by the Court; therefore its being pleaded being superfluous, will be no hindrance to the replication, with this general traverse (a).

CHANGED
against
WIM
AND OTHERS;

* [583]

(a) Judgment was given for the plaintiff, namely, that it did not shew what kind of fault it was. S. C. Ld. Ray. 701.

Anonymous

Case 974.

PROHIBITION was granted to stay a suit in the spiritual court for a salary of parish-clerk (a).

Prohibition to
suit for a salary
of a parish clerk.

Ld. Ray. 1507. Salk. 536. 550. 1. Burr. 367.

(a) A parish-clerk is said to be an ecclesiastical officer as to every thing but election, *Townsend v. Thorp*, 2. Stra. 776. But this case is denied, *Peake v. Bourne*, 2. Stra. 942.; and it is decided that he is a temporal officer, *Pitts v. Evans*, 2. Stra. 1108. Reg. v. Dr. Wall, 11. Mod. 261. and must sue in the tem-

poral courts for his fees, *Gawdy's Case*, 2. Brownl. 48. *Tarrant v. Haxby*, 1. Burr. 367. And though appointed by the minister, if removed by him without sufficient cause, a *mandamus* will lie to restore him, *Rex v. Warren, Cowper*, 370.

Anonymous.

Case 975.

TREVANION, an antient decayed gentleman at the bar, having brought false imprisonment against an attorney of the court, moved to have an attorney assigned him, for none would voluntarily appear for him; and the Court appointed one at his own nomination.

An attorney appointed by the Court to appear for a person.

Anonymous.

Case 976.

AN indictment for forgery was found against one of the officers of the Custom-house; and a rule of Court was moved for to have the books of the office brought to court to be given in evidence at the trial.

Court will not order books to be produced at a trial.

PER CURIAM. It cannot be done according to law (a).

(a) See Mr. Nolan's Note to the case of *Rex v. Hoffman of Newcastle*, 2. Stra. 1223. VOL. XII.

Qq

Watson

Case 977.

Watson against Sutton, Marshal of the Court.

On a *reddidit se* before a Judge the bail is discharged; but the MARSHAL is not chargeable for escape till notice of the *committitur*.

S.C. Salk. 272.
1. Ld. Ray.
704.
Tidd's Pract
150.

DEBT against the marshal for an escape. At the trial a *reddidit se* in discharge of his bail, and a *committitur* in execution to the marshal, was produced in evidence; and after verdict,

It was moved, that it should be set aside, for the *committitur* was irregular; for the course of the Court is, that when any one upon a render is charged in execution, there ought to be notice thereof to the marshal, without which it were hard to charge him with escape; and the course of giving such notice is by making an entry of the *committitur* in a book kept for that purpose by the marshal in the office of king's bench; and the marshal has an officer on purpose in the office to take notice of such entries; and it is not enough that the *committitur* be entered with Mr. Bromfield, the entering clerk. And that was agreed by all the Clerks to be the course.

* [584]

Ante, p. 567.

HOT. Chief Justice. Upon the *reddidit se* the bail are discharged, even upon the *reddidit se* before a Judge (a); but the principal thereupon is not in execution, till the plaintiff has made his election to have him in execution; and upon such election there is a *committitur* entered in the book in the office; and the entry must mention it to be at the request of the plaintiff; and all this is supposed to be in court, and * the *committitur* is filed with Mr. Bromfield. And he allowed two ways of giving the marshal notice, the one to make an entry in his aforesaid book, the other to carry a rule to him from the proper officer; so he agreed it was essential there should be some way of giving the marshal notice. But since this is an irregularity, whereof the defendant might have taken notice before trial, upon motion, and that he has slept that opportunity, and put the plaintiff to the charge of bringing his action and trying it, it is hard to relieve the defendant; and the *committitur*, being now recorded, implies notice necessarily; for it is impossible one should be committed to the custody of another, and he know nothing of it. And as a man can have no *audita querela* of a matter which he had an opportunity of taking advantage of before, and had omitted; so here. Indeed if there were judgment against the marshal for the escape of one in execution upon an erroneous judgment, which is reversed for error, there would be reason to relieve him upon an *audita querela*, upon the special matter. But here, though it was allowed the marshal was not chargeable without a legal *committitur*, which is not compleat till notice, and that in such manner as the settled course of the Court is, viz. by entry in his book in the office, which is now to be taken for law; yet as this case stood it was held he came too late for relief.

(a) But see *Whiteman v. Mullens*, 2. Stra. 1226.

And

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And GOULD, *Justice*, said, no case could be instanced where a verdict was set aside, where there had been a defence and full evidence (a), except it were for matter discovered after the trial, which this was not; and motion was denied, though it was agreed, that upon a *reddidit se* of the principal, the bail has performed the recognizance, without any notice to the plaintiff.

No new trial to be granted where there was full defence, and except for matter discovered after the trial.

For HOLT, *Chief Justice*, said, to set aside this verdict were to take two steps at once. First, To set aside the evidence, which was good and conclusive, and then the trial. And that ought not to be, no more than if debt be brought upon a judgment irregularly obtained, you can set aside the judgment and action at once.

And GOULD, *Justice*, laid it down for a rule, that where a man has matter of defence, and knowing thereof goes to trial, and puts the plaintiff to the charge of proving his issue, he shall never after, in respect of that matter, have a new trial.

Where a man has matter of defence, and knowing of it goes to trial, in respect of that shall not have new trial.

And the rule of keeping the book for entries in the office was held a good course.

(a) See Anonymous, ante, 567.

* [585]

* The King *against* Bowers.

Case 978.

HOLT, *Chief Justice*. To stand *in* the pillory, or *on* the pillory, is the same thing in judgment, and both signify to stand *in* the pillory (a).

Pillory.

(a) The judgment now is, that the offender shall "be set *in* and *upon* the pillory;" and therefore if the under-sheriff remit part of the judgment by only

setting him *upon* the pillory, an attachment lies. *Rex v. Beardmore*, 2. Burr, 794.

MICHAELMAS TERM,

The Thirteenth of William the Third,

I N

The Common Pleas.

Sir Thomas Trevor, Knt. Chief Justice.

Sir Edward Neville, Knt.

Sir John Powell, Knt.

Sir John Blencowe, Knt.

} *Justices.*

Edward Northey, Esq. Attorney General.

Sir John Hawles, Knt. Solicitor General.

Case 979.

Lee against Elkins.

Award to do a thing out of a person's power is void. **UPON** an award these points were agreed by the Court :

1. Roll. Abr. 2. **FIRST**, That an award, that one of the parties should do a thing out of his power, as to deliver up a deed which is in the custody of *J. S.* is void.

3. Mod. 272, 273.

Award of distinct things may be the one depending on the other, the award may be good as to one good, and void part, and void against the other. *Dy. 217. Cro. Jac. 577. Br. Award, 65.*

Ante, 534.

2. Ro. Rep. 46. Cro. Eliz. 432. 2. Lev. 6. 3. Leon. 62. Kyd on Awards, 166.

Breach, how assigned. **THIRDLY**, That in that case the breach must be assigned in that part that is good. *Orm'ad v. Coke (a).*

FOURTHLY, Award of a collateral thing in satisfaction of trespass, good. *Cro. Car. 216.*

FIFTHLY, If arbitration exceed the time of submission, yet no cause shall be presumed to have arisen out of the time, if it be not shewn.

(a) Cro. Jac. 354.

SIXTHLY,

Michaelmas Term, 13. Will. 3. In C. B.

SIXTHLY, That where the submission is simply without condition, award of part is good. 8. Co. 97.

SEVENTHLY, If award be for payment of money at or before such a day, it is no breach to say that it was not paid at the day, but at or before.

But another day the Judges put the case at large, and delivered their opinions *seriatim* in it.

Debt upon an award bond; upon *nullum fecer. arbitr.* an award was set forth, reciting several differences between the parties concerning a parcel of land sold by the defendant to the plaintiff; and that parcel thereof was recovered by a stranger by a prior title from the plaintiff; and that the plaintiff was out of pocket in defence thereof, &c. and then all these controversies were submitted to them on such a day, *viz.* the day of the date of the bond; and then they award, that the defendant should deliver to the plaintiff a certain deed concerning the title of the said land, or pay the plaintiff fifty pounds in case of failure; that he should pay him twelve pounds for his costs in defending the suit concerning the land recovered; and also eleven pounds for his damage by the said recovery; and that thereupon the plaintiff shall give the defendant a general release to and upon the day of the date of the * arbitration bond; and breach is alledged in non-payment of the said eleven pounds, and demurrer.

An award ordering one of the parties to deliver a deed not in his power or possession, or to pay such a sum of money, is good.
S. C. 1. Lutw. 545.
S. C. New' Lut. 168.
3. Mod. 272.

* [586]

One exception to this award was, That it ordered the delivery of a deed which was in the power of a third person, and therefore as to that void; and the plaintiff was not to release till upon performance of all the particulars to be done by the defendant, and one of them being void and impossible was never to be done, therefore the release was never to be given; *ergo* the whole award was *ex parte*.

BLENCOWE, *Justice*. The award is good, for it does not positively order the delivering up of the deed, but that the defendant shall do that or pay fifty pounds.

The SECOND EXCEPTION is, That the release awarded to be made of "all matters, &c. to or upon the date of the award bond, would release the very award bond, and therefore a void release.

AND HE HELD the award good; for let the release awarded be void, and even let the first matter awarded be likewise void; yet here will be sufficient in the award to make it good: for here is twelve pounds awarded for costs in defending the title; and in action for the same costs this award will be a good plea. And again, here are eleven pounds awarded to be paid for the plaintiff's damage; and if he is to pay it for the damage, the plaintiff is to receive it so, and surely that is mutual; and the breach being assigned in that which is well awarded, plaintiff ought to recover.

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LEE
against
ELKINS.

POWELL *acc.* FIRST, It is excepted, that in assigning the breach it is not alledged that on or before the day mentioned in the condition of the bond the defendant did not pay the said eleven pounds, and he agreed that had been the neatest way; but here he held it well enough, as it was laid, *viz.* that the defendant did not pay it *juxta tenorem & effectum* of the award. And the rule is, that where the day of payment or performance appears before on the record, there, in averring performance, or assigning breach for the want of it, you need not mention the day certainly, but may refer it by a *præd.* to the record; for *id certum est quod referendo fit certum*. But if award be for payment of money, &c. at one or more days in a certain indenture mentioned, there to assign breach in non-payment, or to alledge payment at the day; &c. in the said indenture mentioned, would be ill; but the way there is to set forth the indenture, that so the day might appear on record, and then refer to it. *Vide 1. Vent. 87. 3. Cro. 281.* Debt upon bond for payment of money at two several days and places; afterwards defendant pleads *payment *secundum formam & effectum conditionis*; and adjudged good, *reddendo singula singulis*.

Though award
be void in part,
yet if it be mutual
for another
part, it is good
for that.

Vide ante, 129.
Where a particular
thing is to
be done on one
side, as a condition
of doing several
on the other, if any
are ill awarded, it
is ill *in toto*.

SECOND EXCEPTION. The release awarded exceeds the submission, for it extends to the bond of submission. Let it be supposed void for that reason, yet the award will be mutual throughout; *ergo* good. It has been often resolved, that if an award be void in part, as being only *ex parte*; yet if it be mutual for another part, it shall be good for that part; and vide *Osborne's Case (a)*, where it is held, that if award be of some matter within the submission, and for that void, as to that part; and though it appears by the award, that it designed both matters should be recompence of what is to be done of the other side; yet if there be ever so small a matter to make it mutual, it shall stand for the matter within the submission; but *PÉR LUY, durus est hic sermo*; and that judgment was after reversed upon writ of error. *1. Leo. 170.* And the rule there put will not hold of the extent which *Coke* gives it. One recovered ninety pounds damages in waste, and then the matter is submitted to reference; and it is awarded, that the defendant should at one time pay ten pounds to the plaintiff, and that at another day he should pay him fifteen pounds, and that for payment another and the defendant should become bound in a bond; this being good in part, though void for the rest, was held good; but surely that was hard, and would not pass at this day. *Vide Hard. 399.* A difference is taken, where the thing to be done on one side is only applied to one particular thing of the other side; there, though the award be void in other parts, it may be good in that part; *scilicet* where a particular thing of one side

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**LEE
against
ELKINS.**

And as to the awarding the releases, the one, besides what before is said, is ordered to execute a release to the other to and upon the day of arbitration bond; and *super performanceem inde*, the other is to release to him in like manner; so that the one is not ordered to release till all the matter to be done, or awarded to be done of the other side, be performed. And though the awarding such a release were void, yet, if the giving thereof be ordered to be before the other does release, it is a condition precedent, which ought to be before the release is to be made by the other; and that is one of the points resolved in *More and Bigle's Case*. But *PER LUX*; This diversity is to be observed; where an award consists of divers things, and one of them is void, and it be expressly said, that upon performance of that void thing the other party shall do such a thing, there the doing of the void thing is a condition precedent, and must be averred, before action against the other for not doing his part. But where there be several things in an award, and some are good, and others not, and it is further said, that upon performance *premissorum* the other shall release for the purpose, there it suffices to make averment of performance of what is well awarded, without more. *Vide 2. Keb. 759. 833.* So here, there being several matters awarded, the *super performanceem inde* shall aver it to release; averment of performance of what is well awarded is sufficient. *Vide 2. Lev. 3. sec. libid.*

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against
ELKINS.

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Release to the
time of submis-
sion, is perform-
ance of award of
release to the
time of award.

only go to that part of the award which is good ; and performance of so much obliges the other to do what belongs to him. Suppose award be, that both parties shall make mutual releases to one another to the time of the award, and that *A.* upon *B.*'s making him such release, should release to *B.* *B.* tenders a release to *A.* to the time of the submission, it would be a good tender ; so it would be here. 1. *Roll. Ab.* 260. 1. *Sid.* 265. *per Windham. Hutt.* 29. *cont.* to *Roll.* 244.

Besides, this release would not discharge the bond, notwithstanding the words reach to it ; for the award is, *de et super præmissis. Vide Allen*, 51, 52. the consequence of these words in an award. And though these words have but of late been introduced into pleading, yet it is to very good purpose to put them in ; for thereby the general words of an award are applied only to the matter submitted. And if award be to pay money at a day to come, and the other shall give a release *de præmissis*, it shall only be a release of things before the submission. So here, the release of matters to and upon the day of submission shall be intended of matters on that day before the submission.

NEVILL, *Justice*, agreed the plaintiff ought to have judgment, but doubted if the award were good throughout ; and cited *Hob.* 109. *contra* to *Roll. Abr.* 254.

TREVOR, *Chief Justice*. I am not satisfied that that part of the award which relates to release is good ; but hold the award good as to the rest. First, This is a release to be given by the defendant to the plaintiff at a day after the submission of all matters, &c. to or upon such a day, which is the date of the arbitration-bond ; and thereupon the like release is to be given by the plaintiff to the defendant. Now I think the awarding the first release is void, for it takes in the arbitration-bond expressly as can be. Though I agree with BROTHER PCWELL, *de et super præmissis* is of good use in a general matter, where there is room for extensive construction, to restrain it to matters submitted ; but where words are very plain and full, I deny that *de et super præmissis* will do the business. As if award be, that one party shall on such a day give a general release to the other, there *de et super præmissis* will make it interpretable to be a release only to the submission, though to be made long after ; for though it be given now, it may only be of matters long before ; and in that generality of words it shall be intended a release of such things as the parties that ordered it had power to order a release in. But here they expressly shew how far the release shall work, *viz.* to and upon the day of submission ; and to construe this otherwise than they have expressly declared it, will be very odd. And surely to construe a tender of a release to time of submission to be good, where the arbitrators have ordered a release to the time of the award, would be to make an award, and not declare the law upon it ; and then farewell all awards. And it is in *Hutt.* 447. that awarding a release to time of award is void ;

Per Trevor,
Award of a ge-
neral release
shall not extend
further than to
the time of sub-
mission ; but if
award by express
words to the
time of award,
it shall be so.

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which

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which could not be if it could be made good to the time of submission. 1. Ro. Ab. 242. 1. Ro. Rep. 1, 2. So as to that point I differ with my BROTHER POWELL. And the present case goes not so far as that before put, for this is not to the time of the award, but only to and upon submission day; and the law will make no fractions of a day; and the submission being of all matters on that day, the release is likewise so: so that if that were the question, I could not give my opinion for the making it good as far as it goes upon the release.

Let
against
Elkins.

Now as to the release ordered to be given by the plaintiff to the defendant, that cannot be ill awarded upon the same reason that I hold the other ill, viz. that it would release the award bond; for that release by the award is the last thing to be done, and then it is no matter though it should release the bond, the conditions whereof would be completely performed by the giving of it. But I hold, it will not be good upon another reason, because it is to be given upon the defendant's performing all the parts of the award of his side; so that is the consideration of it, which is a matter precedent, and therefore ought to be first performed. So if any thing that is awarded to be done by the defendant be void, it ought not to be done; and till it be done, this release is not to be made; ergo never to be made. So I do agree with my BROTHER POWELL, in part, viz. that if part of the award be void, yet if it be a condition precedent, it must be performed before the other performs of his side; but my Brother's diversity of express words of reference I think will not hold; that is, that where the words be express that upon performance of that part which is void, the other shall do such a thing, there the void thing, says he, is a condition precedent, and must be done; but where several things are ordered, and some of them void, and that *super performanceem prem.* such a thing shall be done, there, he says, it is enough to do that which is well awarded, to be intitled to the thing to be done of the other side: I say, that every illegal part of an award is the same thing, to many purposes, as if it were not in; but yet if it appear that the arbitrators designed that * such illegal part should be part of the consideration in respect of which the other was to perform, it must be done, or else here is not that advantage for the other side which was designed for it; and he has a wrong done him by being forced to pay for a consideration which he has not.

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2. Lev. 3.
If it appear that a void part of award was intended as a consideration of a thing's being done on the other side, it must be done.

Then here is a submission of all matters in difference; and here is mention made of such causes of demand the plaintiff has against the defendant, and such and such matters ordered to be done by him in discharge of them; and accord with satisfaction would be a good plea in actions for them, therefore this award will,

Judgment for the plaintiff.

Simson

Cafe 980.

Simfon *against* Barlow.

To say to a milliner, "Thou art a beggarly fellow, and not worth a farthing," are actionable without special damages.

1. Roll. Ab. 61.

1. Sid. 434.

1. Lev. 276.

Cro. Car. 472.

Carth. 330.

3. Mod. 112.

355.

Ray. 207.

Cro. Jac. 578.

Palm. 63.

Ld. Ray. 1480.

Stra. 76a.

IN AN ACTION ON THE CASE the plaintiff declared, that he was of and used the trade of a milliner, and was of good credit and reputation; and that the defendant, with intent, &c. said these words to him, "Thou art a beggarly fellow, and not worth a farthing;" and laid, that by reason of these words *A.* his former customer left him: AND THAT the defendant, *ex ulteriori malitia*, said of him, "You are not worth a farthing." Verdict and entire damages.

IT WAS MOVED *in arrest of judgment*, that the damages being entire, it must be intended they were assessed for both the words, and that the second words were not actionable, though the first were, in respect of the special damage; therefore there could be no judgment.

CURIA. It is true, if the second words be not actionable, though the first be, yet since damages are entire, there ought to be no judgment: BUT WE HOLD both words are in themselves actionable in this case, for they both prejudice the plaintiff in his credit, he being a tradesman, and by consequence living by his credit, and this being a trade well known, of which credit is a great support. The authorities are many as to the first words: 1. *Jo.* 321. 1. *Cro.* 317. said of a *Hamburg* merchant, "He came a broken merchant from *Hamburg*;" which words are not so strong by a great deal as those now in question; for though they did not import that he *was* a broken merchant at that time, but *had been* so some ten years before, as appeared by the declaration, and he might be a good man at the time of speaking the words, yet they were adjudged actionable. *Hutt.* 125. action maintained by a fuller for these words; "Trust him not; he owes me one hundred pounds, and is not worth a groat;" and because he was a tradesman, and that the words did tend to his discredit, they were held actionable, though there were other words put in, "He owes me one hundred pounds;" and it might be intended that the words meant he will not be worth a groat when he has paid me my one hundred pounds; and it was not as much as said that he was not able to pay the one hundred pounds. *Style*, 425. said to a tradesman, "Thou art in a broken decayed condition;" and held actionable; and to say that one "is not worth a groat" is worse than to say that he is in a decayed condition. The only case against us is that of 1. *Roll. Abr.* 86. an action by a dyer for these words, "Thou art not worth a groat; and there it is said, judgment was arrested: it was error of a judgment in a county court: and the declaration averred, that where the words were spoke, the words spoke of a tradesman were of the same acceptation as if it were said that he was a bankrupt; and it was held, there was no occasion for the averment, for the words were intelligible enough of themselves, but that the action would not lie; for though he were

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were worth nothing, yet he might have good credit. But in the same page it is held, that to say of one that trades, that "he is a beggarly fellow," with averment that it was said in *London*, where they did import that he was a bankrupt, was actionable. And we think the averment signifies nothing in the case, for it does not alter the nature of the words; for to say of a tradesman in any place, that "he is not worth a groat," imports a scandal; and no body will trust a man that is thought to be worth nothing. And the *Case of Boulsworth*, "Thou art a beggarly fellow, go home and pay your debts," was cited; and held it was hard in nothing but the excessiveness of damages. And *Hill v. Drake (b)*, "He is a beggarly fellow, and not worth a groat, and not able to pay his debts;" which latter words, "not able to pay his debts," do not aggravate the case.

SIMON
against
BARLOW.

By THE WHOLE COURT, Judgment was given for the plaintiff.

(b) Raym. 124.

Shaw against Bull.

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Case 981.

ONE seised in fee of five messuages, by his will devised two of them to his wife for life, remainder to his two daughters in fee; and devised the third to the wife and her heirs; the fourth he devised to the wife and her * heirs, she paying his legacies, in case his goods and chattels did not answer them all; and if she did not make provision for the payment of his legacies in her life-time, that it should be lawful for the legatee, after her death, to sell the said messuage to satisfy the legacies out of the value thereof. And then follows this clause, on which the doubt arises, "and all the overplus of my estate to be at my wife's disposal, and make her my executrix."

One seised of two houses devises one house to A. and her heirs, she paying his legacies, in case his goods and chattels were not sufficient; and if she did not make provision for the payment of them in her life-time, the legatee

And THE COURT delivered their opinions *seriatim* thus:

BLENCOWE, *Justice*, It appears he had five messuages, and devised four of them, and says nothing expressly, or at least particularly, of the fifth; but the question is, whether there be words enough to shew his intent was to pass the fifth messuage to his wife; for if that appear to be his intent, it ought to go to her. If he at first had devised her "all his estate," this house would have passed to her; but compare this clause to the subsequent words, "and make her my executrix," it shews his intent was to grant her such estate as she was capable of as executrix, and that is only personal estate; so the sense would be, "and I give my wife all the overplus of my personal estate, and make her my executrix." If he had said, "I make my wife my executrix, and give her the overplus of my estate," that would only give her personal estate, or chattel; and will it not be the same thing to invert the sentence? Again, to consider this clause as it stands with the precedent words, there is a devise of the fourth messuage to her and her heirs, paying

might sell the same: and all the overplus of my estate to be at A.'s disposal; and made her executrix. The second house does not pass. S. C. 2. Eq. Abr. 320. Saik. 234. 236. 6. Mod. 106. Making one executor, and giving the overplus of the estate, gives only the personal estate.

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against
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his legacies, &c. ; and if she does not provide for payment of them, that it shall be lawful for the legatee to sell it ; and all the overplus, &c. which may very well be satisfied by making a devise of the overplus of the price of the house, when sold by herself or legatee ; for if she in her own life-time had sold the house, it would become a chattel of an inheritance : that is, the overplus, after paying the legacies, was what he intended her by these words. For the house being devised to her and her heirs, and ordered to be sold for payment of legacies, the overplus would perhaps in equity be adjudged in her as executrix ; but by these words, and this construction, she would be a residuary legatee. So that if you couple it with the subsequent words, she has only the overplus of his chattel-estate ; if with the precedent, it will be the overplus of the purchase-money of the fourth house when sold ; and so by no means does extend to the fifth house.

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Words which of themselves would disinherit an heir at law, if joined with others which make them less forcible, shall be construed for his benefit.

* POWELL, *Justice*. Uncertain words in a will must never be carried so far as by them to disinherit the heir at law (a) ; and though there be words which of themselves would disinherit him, yet if they come in company with other words, which do render their natural import less forcible, they ought to be construed favourably for the heir. And the case of *Bowman v. Milbank* (b) was upon this reason ; the words were, " I give all to my mother," which might include whatever he had to give, either chattel or inheritance ; yet because it may be all personal or chattel, or all real or inheritance, it was taken to be too loose and general to disinherit an heir at law ; and therefore no land did pass. In *Noy*, 48. A. seised of *Black-Acre* and *White-Acre*, devised both to his wife for life ; the remainder of *Black-Acre* to J. S. in fee ; and leaves the fee of *White-Acre* undisposed of ; and then said, " and I make my wife my executrix of my goods and land ;" the inheritance did not pass, though the words, according to the civil law, would include it. An inheritance yet will pass in a will by the words " all my estate ;" yet they are very general, and do take in a personal estate, or a real estate, or both together ; and therefore, when the words " all my estate" are in a will, they are always let to be governed by some other words in the will (c). And therefore in the case of *Jonson v. Kerman* (d), a devise of all his estate, paying debts and legacies, and he was found to owe debts beyond his assets, the inheritance was adjudged to pass. A man, among all other things, devises his personal estate, his inheritance does not pass. 1. *Mod.* 100. 3. *Keb.* 140. 145. One devised all his tenant right in *Dale* ; if he had no other freehold in *Dale* it shall pass ; *secus* not.

(a) See *Doe on the Demise of Gaskin v. Gaskin*, Cowp. 661. that though the intention is ever so apparent, the heir at law must of course inherit, unless the estate is given to somebody else.

(b) 1. *Eq. Abr.* 207. 1. *Lev.* 130. *Raym.* 97. 1. *Sid.* 191. 1. *Keb.* 719.

(c) See *Bridgewater v. Bolton*, 6. *Mod.* 366. *Ridout v. Paine*, 1. *Vezey*, 10.

3. *Atk.* 486. *Tanner v. Wife*, 3. *Peer. Wms.* 294. *Barry v. Edgworth*, 1. *Peer. Wms.* 524. *Macarce v. Tail*, Amb. 181. *Stiles v. Walford*, 2. *Black Rep.* 938. *Holdfast v. Martin*, 1. *Term Rep.* 411. *Doe v. Chapman*, 1. *Hen. Bl Rep.* 223. *Doe v. Woodhouse*, 4. *Term Rep.* 89.

(d) *Stiles*, 281. 293.

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In the case of *Reeves v. Winnington (a)*, "I hear J. S. is enquiring after my death, but I am resolved to leave him nothing but what his father left him, but I leave all my estate to my wife," there the wife took all the real estate; and the reason was, because of the other words, which shew he meant to exclude the heir at law. In *Michaelmas Term*, in the thirty-second year of *Charles the Second*, Roll 473. A. had freehold and copyhold land, and makes his will in these words: "I give all my estate, of what kind soever, not before mentioned by me, to my wife, whom I make my executrix;" and it was held, the copyhold land did pass, not by force of the words alone, but because it appeared that he had made a surrender of the copyhold estate before to the use of his will. But here is nothing to help the words here: for, first, here is a devise of his other houses by particular words; two of them he gave her * for life, with remainder over; the third to her and her heirs; the fourth for her and her heirs conditionally; and all by express words. And it is hard to say, that if he designed her the fifth house, that he would attempt to pass it by these general words, more than he did the former houses; especially to make such construction to disinherit an heir at law. **OBJECTION.** What is meant by these words, if the fifth house does not pass; it cannot be the residue of his personal estate, for he had not enough to pay his legacies; and it is plain part of them were not to be paid till after the death of the wife; for the words are, "that if she in her life-time did not pay them, then the legatees might sell;" and therefore the words cannot be satisfied by applying them to the residue of the house when sold, for it was not to be sold till after her death; and to leave the residue of a thing not to be disposed of till after her death, at her disposal, seems unreasonable. **ANSWER.** It does not appear what personal estate he might have, though he made this cautionary provision for fear he should not have enough; and there might happen some contingencies, for which wife men do make allowances in their designs. Besides, it is plain he meant the wife should make provision for the payment of the legacies in her life-time, and then she might sell the house in her life, and then the words would have a natural operation, viz. to give her the residue of the value of the house. And suppose neither of these things were, she might dispose of it by her will, like one contingency of a distribution, which none know till distribution made.

NEVILL contra. I agree the words of a will to disinherit an heir at law must be very plain and apparent in the will; but since men may devise their land, as well as pass it by deed executed, we ought to follow their intent, and make it their will and not ours. It is true, an heir at law shall not be lightly disinherited; and the intent of the testator is to be gathered from the words on the face of the will. But surely the words in question are very comprehensive, "all the overplus," which relates to something before, of which it is an overplus; and the things gone before are a real estate of in-

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aga^{nt}
BULL.

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(a) 3. Mod. 45. 2. Show. 249. 2. Eq. Abr. 299.

heritance:

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against
HULL.

heritance: and if he had said, all the overplus of my real estate, the fifth house would pass by it; and these being *verba relata* are the same.

TREVOR, *Chief Justice*. I agree with my two Brothers that spoke first. The cases of this kind in Books are each upon its own particular reason, and affect not this case. And I confess, in construction of wills generally, the words "my estate," "the residue of my estate," or "the overplus of my estate," may well pass an inheritance, where the intent is apparent to pass it; but such intent to carry an inheritance by such words must be very apparent, and necessary to be drawn from the words of the will and circumstances of the case. For if the words be indifferent to real and personal estate, or may be applied to personal alone, there the heir at law is not to be disinherited by the implication of such words, or by any implication at all but what is a necessary one. *Style*, 293. Devise of land "paying all his debts and legacies," the inheritance passes; because, by the apparent intent of the testator, his personal estate was not sufficient to pay his debts, &c.; and so, for the necessity of performing his intent in payment of them, it was held the inheritance did pass. 3. *Keble*. 45. upon the same reason. Then, upon consideration of the parts of this will, there is no necessary intent to be gathered from the several parts of it to pass this fifth house. First, It is plain the testator was very particular in expressing what he would pass in his will, and leaves little room for construction; he very particularly and expressly devises and limits the four houses, and what estates the devisees shall have in them; and that of a sudden he should alter his method of devising, and go about to give his wife an estate by general and doubtful descriptions, seems odd; and we will intend he remained consistent and agreeable to himself during the whole will, and knew that what he did not give to the wife would go to the heir, and therefore had no occasion of saying anything of the fifth house, or of him. And as to the objection, that if these words do not carry the fifth house they are of no use; I own, if that were true it were a weighty objection; but they are to be otherwise well satisfied; for the fourth house is devised to her in nature of a trust, liable to the payment of legacies; and upon default in her, power is given to legatees to sell; so if these words had not been put in, what should become of the overplus? It would be doubtful how that would be in chancery; and there are cases on both sides: it was a question, whether when lands are given in trust, and money is raised by sale of them, and there is an overplus, whether that shall be a resulting use for the heir at law or for the trustee. In the case of *Brown v. North* (a), in *Bridgman's* time, it was a question again; and it was held, the trustee should have it. So here being a trust in the wife of the fourth house for payment of legacies, it was not unnecessary to explain that it was his intent the wife should have the surplusage or

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To make an inheritance pass under the words "the residue" or "overplus of my estate," the intent must be very plain; for if they stand indifferent to real and personal estate, shall not disinherit the heir.

Cowp. 661.

* [597]

(a) Tothill, 259.

overplus;

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overplus; which rightly signifies a residue of something before not disposed of. And this residue, after sale and payment of legacies, is an overplus of his estate; and where words in a will may be satisfied, without carrying an estate from the heir at law, they shall never be construed to disinherit him; for the heir is not to be disinherited at all by any implication but such as are necessary, and without which the words would be rejected as void, and of no sense or signification. And she herself might sell in her life-time, and then she was to have the residue; or if the legatee sold after her death, her executor should have it in the right of her, and not as trustee, to be accountable to any.

SHAW
against
BULL.

Jud. acc. per TREVOR, Chief Justice, POWELL and BLENCOWE, Justices.

Wetherell *against* Clerkson.

Case 982.

ACTION ON THE CASE for these words, "You are a whore, and a perjured whore," *per quod* she lost her marriage. After verdict for the plaintiff,

In an action for saying, "You are a whore," by which she lost her marriage, the name of the person who refused to marry her must be set forth.

IT WAS MOVED *in arrest of judgment*, that she had not laid in certain with whom she had lost her marriage; for the words being not actionable, but in respect of the special loss, therefore that ought to be shewed in certain, for it is issuable.

S. C. 2. Lutw. 1295.
S. C. New Lut. 411.
1. Lev. 146.
Bull. N. P. 7.

And though it was objected, that the jury have found loss of marriage, and then it must have appeared to them, and that could have been only with one; and *Hetley*, 8. was quoted for this;

Yet THE COURT held the objection fatal; for where the laying of particular damage is the *gist* of the action, it ought to be laid specially and certainly, that the defendant may have an opportunity of traversing it; and there is no case where the laying of particular damage is necessary to the maintenance of the action, but it must be laid certainly; and the opinion in *Hetley* is long since exploded; *scilicet* where the particular damages are not the *gist* of the action, but only an aggravation.

Et quer. nihil capiat per billam.

* [598]
Case 983.

* Coke *against* Heathcot.

NOTE: The Court will never give leave to bring principal and interest into court, and stay proceedings upon a bond when the suit is upon a counter-bond, or when there is any pretence of a collateral agreement (a).

Principal and interest not brought into court on a counter-bond.
2. Salk. 597.
6. Mod. 101.

(a) See 4. & 5. Ann., c. 16. Tidd's Practice, 290. 3. Burr. 1370. 2. BL Rep. 938.

Anonymous.

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Case 984.

Anonymous.

On relief by *audita querela*, he is restored to all that was lost.

1. Vent. 34. 264.
3. Mod. 249.
2. Crompt. Prac. 417

NOTE: When one is relieved by *audita querela*, he shall be restored to whatever he lost by the judgment. And if a man has a release from the plaintiff which he has not an opportunity of pleading, and brings reasonable proof of it, the Court will relieve him upon motion, and award a *superfedeas* of the execution. And upon an *audita querela* the bail generally ought to be put in in court.

Case 985.

Anonymous.

Cannot amend after issue joined.

ONE cannot amend after issue joined and entered, much less after verdict; and who discontinues must pay costs.

Case 986.

Stedman *against* Robison.

In suit in inferior court, it must appear the contract was within the jurisdiction.

Ld. Ray. 795.
1040. 1555.
6. Mod. 223.
Salk. 404.

FALSE JUDGMENT from a county court, where debt was by *justicies*. The declaration was, that the defendant was indebted to the plaintiff, within the jurisdiction of the court, for goods sold and delivered; and because it was not alledged that *the contract* was within the jurisdiction, judgment was reversed; for if one be indebted to another, he is so wherever he goes (a). *Vide* 1. Vent. 243.

(a) See Baker v. Holman, 1. Freem. 317. Winford v. Powell, 2. Ld. Ray. 1310. Walduck v. Cooper, 2. Will. 16. Villars v. Cary, 6. Mod. 303. Higginson v. Martin, 2. Mod. 195. Stannian v.

Davis, Salk. 404. 6. Mod. 223. Emery v. Bartlett, 2. Stra. 827. Trevor v. Wall, 1. Term Rep. 151. Rowland v. Veale, Cowp. 18.

Case 987.

Gwin *against* Thornborough.

Leet may amerce for a public nuisance.—See 3.

PER CURIAM. One cannot be amerced in a leet for a private nuisance, but may for a public.

Hawk. P. C. 7th edit. ch. 10. f. 17. and ch. 11. f. 4.

* [599]

Case 988.

Roberts *against* Arthur.

When there is a *profer* of a deed, it remains in court all the Term.

2. C. 2. Salk. 497.
3. C. Holt, 421.
36 Hen. 6. pl. 30.

PER CURIAM. If, upon pleading a deed, a *profer* be made of it, it shall remain in court all the Term, and no longer, if it be not controverted; but letters of administration shall not be kept in court all the Term, because the * administrator may have other actions pending, and it would be a prejudice to him. *Vide* 36. Hen. 6. 30. And giving of *oyer* is the act of the Court, and therefore to be done by the prothonotary in his office, where now the course is to do such things as were done in court, when the pleadings were *ere tenus* at the Bar, and an attorney ought not to do it.

MICHAELMAS

MICHAELMAS TERM,

The Thirteenth of William the Third,

IN

The King's Bench.

Sir John Holt, *Knt. Chief Justice.*

Sir John Turton, *Knt.*

Sir Littleton Powys, *Knt.*

Sir Henry Gould, *Knt.*

} *Justices.*

Edward Northey, *Esq. Attorney General.*

Sir John Hawles, *Knt. Solicitor General.*

Worsenholm against Manucaptors of Berks.

Case 989.

SCIRE FACIAS against bail, who plead "no *capias* against the principal." The plaintiff replies, and sets forth a *capias* returnable *coram rege* indefinitely; and upon *nul tiel record* produces one *coram nobis apud Westm.*; and upon demurrer,

Capias returnable *coram rege*, one produced *coram nobis apud Westm.* no material variance.

It was urged by SQUIB and others, that here was a variance. *Vide Dyer, 153. 7. Hen. 4.* If one plead an outlawry at the suit of *A.* and produce one at the suit of *B.* it will be a fatal variance; for if it were ascertained at whose suit the outlawry was, the other might reply that it was reversed; and a *capias* returnable *coram rege ubicunque* and *coram rege apud Westmonast.* are distinct species of *capias*. If a plea be held before nine commissioners, and a *certiorari* come to remove the record, and the record certified be said to be *coram* eight, it will be a material variance; though it may be said, if it were before nine, *à fortiori* it is held before eight; *quod fuit concessum*.

And HOLT, *Chief Justice*, said, if a *capias* be *coram nobis ubicunque craft. Animarum* for the purpose, and before that day the Term is adjourned to *Oxford*, by that *capias* the parties have a day at *Oxford*; but if in that case it were *coram nobis apud Westmonast.* the parties indeed would have a day at *Oxford* by the writ of ad-

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R r

journalment,

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WORSENHOLM
against
MANUCAP-
TORS OF
BEAKS.
1. Vent. 46.

Vide 1. Vent.
233, 234-
2. Liv. 85.

* [600]

A record taken
before nine, one
returned before
eight is a materi-
al variance.

jourment, but not upon the *capias*; and when a writ is return-
able at a common day, it is always *ubique*; but if the Court be
at *Westminster* at the time of issuing the writ, and it be made re-
turnable *coram rege* at a day certain, it must be intended at *West-*
minster.

BUT PER CURIAM, This is no material variance; and they
compared it to the case in *Hob. 54, 55.* where a *capias* was plead-
ed, which being without addition is to be understood of an original
capias, and an *alias capias* produced, and it was held it did main-
tain the plea. *Yelv. 46. 2. Cro. 32.* Case for malicious prosecution,
upon an indictment *coram* such and such justices of peace, *nec non*
ad diversas felonias, &c. and in the indictment they were styled
only justices of the peace; and yet it was held well, being the
same in substance; so here; and the difference between a material
and substantial variance, and what is not material; as in the case
of a record before nine, and a record before eight removed. the
variance is material; for that it was before nine is the description
of it, which does not agree with a record before eight. On the
other hand, see *Bro. Abr. "Failure of Record"* In an affize
tenant pleaded a recovery against *J.* and produced a record of a
recovery against *J.* and his wife, and judged good.

And judgment for the plaintiff.

Case 990.

Beech against Trevors.

Debt on recog-
nizance, *cognovit*
se debere held
well.

Cro. Car. 363.

DEBT upon a recognizance in chancery; the declaration was,
"that the defendant *personaliter constitut. coram rege in can-*
cellaria cognovit se debere in such a sum."

BRODERICK excepted, that here were no obligatory words;
secus if it were *debere*.

BUT PER CURIAM, Though it might be better so, yet *debetur*
is said passively; and the word *debeo* is not necessary to make a
debt, for *teneri* or *obligari* would do. And there is no such word
in true *Latin* as *indebitatus*; yet it has now obtained in law:

And the plaintiff had judgment.

Oyer craved in
debt in *C. B.*
on a recogni-
zance in chan-
cery.

NOTE.—HOLT, *Chief Justice*, asked the Counsel for the plain-
tiff, if debt were brought in the common pleas upon a recogni-
zance in chancery, and the defendant craved *oyer* thereof, what
must be done? for if covenants be, and bond for performance, in
debt thereupon the defendant's way is to produce his part. *Vide*
1. S. 20.

Case 991.

Anonymous (a).

What evidence
will maintain a
declaration.

THE plaintiff in an action on the case declared on an agreement
made between him and the defendant, that the defendant
would let him have the use of twelve acres of turnips for such a
time, for his sheep.

(a) At *nisi prius*, before HOLT, *Chief Justice*.

The

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The evidence was, that he would let him have twelve acres of Anonymous turnips.

And *per Holt, Chief Justice*, It maintained the declaration; for the land did not pass, as it would by grant of so many acres of pasture; but it is like granting so many acres of corn, whereby the corn only would pass.

* [601]

* The King *against* Worfenholm and Weeks.

Case 992.

THEY being indicted, one of them removed it by *certiorari*, Indictment against two, one of them removed it by certiorari, it is removed quoad both. entering into a recognizance to carry it down to trial.

AND IT WAS RESOLVED, That the indictment was removed March, 112. *quoad* both; and that the defendant who removed it saves his recognizance, by trying it as to himself, for that the acquittal of one is not an acquittal of the other, nor *vice versa*; neither can it be exacted of him to enter into a recognizance to try against 2. Com. Dig. "Certiorari" both; and that notwithstanding the other defendant had appeared below, and now by the removal is put without day; wherefore if (E.) he do not come in above *gratis*, process of outlawry shall go against him: and for this cause it was, that before the statute, the course was to grant no *certiorari* to remove indictments from London or Middlesex, without the defendant gave bail to try it.

And THE CHIEF JUSTICE said, it is always indorsed on the back of the *certiorari*, at whose request it is granted; for though it be the king's command, yet it is at the prayer of the party; and the end of *certiorari*'s is to do justice, and prevent vexation and oppression. And if two be indicted jointly, and join in plea, there shall go but one *venire facias*; *secus* if they sever. Certiorari is indorsed at whose request it is granted.

The King *against* Love.

Case 993.

TO a *mandamus* to swear him common-council-man for the town of Cambridge, it was returned, that he had not taken the oaths according to 23. Car. 2. A common-council-man must take the oath.

And good *PER CURIAM*, after arguments (a).

(a) *Pex v. Slatford*, 5. Mod. 317. *S. C. 1. Ld. Ray. 559. Rex v. St. John's, Cambridge, 4. Mod. 233. Rex v. March, 2. Burr. 999.*
Rex v. Mayor of Oxford, 2. Salk. 429.
Rex v. Mayor of Abingdon, 2. Salk. 432.

Anonymous.

Case 994.

THE principal died before the return of the second *scire facias* against the bail, and after a *capias* returned against the principal, Bail are fixed by the return of the capias against the principal, tho' he died before the return of the second scire facias; but they might have pleaded the death before the return. Ante, 112. 236. 1. Jones, 339.

IT WAS URGED, that since the bail would have been discharged by rendering the principal at any time before the second *scire facias* returned, and that they are now deprived of that advantage

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ANONYMOUS. tage by the act of God, it were but reasonable to discharge them (a).

But **PER CURIAM**, It cannot be; for it is indulgence to allow a tender after a *capias* returned in discharge of them; and their recognizance is forfeited upon the *capias* returned against the principal; and the Court will only discharge the bail after, where they render, but * not where they cannot; but the death of the party before a *capias* returned, had been a good plea to the *scire facias*, and so was the rule (b).

(a) If a principal, pending suit, become a peer, *Trinder v. Shirley*, Dougl. 1. 45. or member of the house of commons, *Langridge v. Flood*, Tidd's Pract. 152. or be convicted and sentenced to transportation, the Court will permit an *exoneratur* to be entered on the bail-piece; *Wood v. Mitchel*, 6. Term Rep. 247. or the bail be permitted to deliver him to the marshal, *Peter Vergen's Case*, 2. Stra. 1217 except he be actually on board the transport, *Fowler v. Deener*, 4. Burr. 2034.

(b) See *Hutchinson v. Smith*, 8 Mod. 240. *Wilmore v. Clarke*, 1. Ld. Ray. 156. *Whitehead v. Gale*, Barnes, 106. *Peregal v. Mellish*, 5. Term Rep. 363. and *Rawlinson v. Gunston*, 6. Term Rep. 284. in which last case it is determined, that if the principal die after the return of the *ca. sa.* and before the return is filed, the bail are fixed, and the Court will not stay the filing of the return in favour of the bail.

Case 995.

Anonymous.

PER CURIAM. A plaintiff in error cannot move to quash his writ of error before error assigned. *Ld. Ray. 349. Stra. 537. Sellon's Pract. 538.*

Case 996.

Anonymous (a).

A person who had compounded an indictment for an offence of a public nature, was fined. **IN** case for money received to the plaintiff's use, it appeared on evidence that the defendant had indicted the plaintiff for regrating wool; and afterwards compounded the matter with him for a sum of money, for which money this action was now brought by the plaintiff (b).

And **HOLT, Chief Justice**, was so angry with the parties for compounding an indictment of a public nature, that he had the plaintiff nonsuited, and fined the defendant; but he said, if it were an indictment for a private wrong they might do it.

(a) At *nisi prius*, before **HOLT, Chief Justice**.

(b) In what cases an action will lie to recover back money received upon an illegal consideration, see *Jaques v. Go lightly*, 2. Black. 1073. *Jaques v. Withy*, 2. H. Bl. Rep. 65. *Munt v.*

Stokes, 4. Term Rep. 564. and to recover money where the consideration arises from an illegal act, *Allen v. Rescous*, Lev. 174. *Webb v. Bishop*, Bull. N. P. 16. *Featherstone v. Hutchinson*, Cro. Eliz. 199.

Case 997.

Anonymous.

The remedy against a factor is **HOLT, Chief Justice.** The proper remedy against a factor, acting as such, is *account*; but if he convert, *trover* will lie against him.

A. finds

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A. finds goods of *B.* and refuses to deliver them to him, his remedy is *trover*; and if *C.* happens to get them, *A.* may maintain *trover* against him, but he shall have but one satisfaction; but after *A.* has recovered against *B.* *B.* may maintain *trover* against *C.* In what cases *trover* lies.

Anonymous.

Cafe 998.

HOLT, *Chief Justice*. The confession of the party is evidence, but the worse sort of evidence. Evidence.

Anonymous.

Cafe 999.

HOLT, *Chief Justice*. Since the statute of 14. Hen. 8. c. 5. of confirmation of the charter of the college of physicians, none can practise physick in London, or within seven miles round it, without a LICENCE from the College; and the exception therein does not qualify the prohibitory clause in it, but only orders that in all parts of England a practitioner of physick must either have a licence from the College, or be a graduate in either of the universities; and that, he said, was the scope of the statute in few words (a). Physicians not to practise in London, or seven miles round, without licence of the College; any where else must be a graduate, or have licence. Ante, 386, 387.

And PER LUY, If an action be brought upon act of parliament, and it be set forth to have been held by *prorogation*, when it was by *adjournment*, it will be fatal; and before the time of *H. 6.* acts of parliament were by way of petition and answer. Stating a session to be *prorogued* instead of *adjourned* is fatal.

(a) See upon this subject Dr. Bonham's Case, 8. Co. 114. Dr. Tenant's Case, 2. Bulst. 185. Anonymous, Palm. 486. Dr. Bush's Case, 4. Mod. 47. Dr. Salmon's Case, 5. Mod. 327. Dr. Groenvelt's Case, 1. Salk. 396. 1. Ld. Ray. 230. Comy. Rep. 76. Rose's Case, 6. Mod. 44. Dr. Askew's Case, 4. Burr. Rep. 2186 to 2208. Dr. Fothergill's Case, 5. Burr. 2740. Dr. Stanger's Case, Easter Term, 36. Geo. 3. and a work published by Dr. Ferris, intitled, "A General View of the Establishment of Physic as a Science in England, by the Corporation of the College of Physicians, London," &c. &c. sold by Johnson.

* [603]

* Anonymous.

Cafe 1000.

A WOMAN, whose husband had left her about twelve years before, had carried on a trade in her own name as a widow, and gave receipts in her own name, being sued for a debt contracted in the course of her trade, gave *coverture* in evidence, and gave evidence of her husband's having been lately alive in Ireland. A *separate trader*, though a *separate trader*, cannot be sued.

And MY LORD directed the jury to find for the defendant, and so they did (a).

(a) But see King and his Wife v. Jones, 2. Stra. 811. Ld. Ray. 1555. 1. Com. Dig. "Abatement" (H. 42.)

Anonymous.

Cafe 1001.

PER CUSTOD. SIGIL. IN CANCELL. This Court will never help a defective conveyance, without consideration; as if a man voluntarily make a conveyance to another of his estate, Equity will not help defective conveyance, if without consideration. and consideration.

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ANONYMOUS. and it proves defective; *secus* if it be for money, marriage jointure, &c.

And whereas PRATT at the Bar affirmed that equity would compel an execution of a trust declared expressly, though without consideration;

MY LORD answered, I do not think so truly.

Case 1002.

Anonymous:

Service of declaration.

PER CLERK, *Master of the Office*. If there be a visible attorney, a leaving a declaration in the office not sufficient; *secus* it is good (a).

(a) See 8. Mod. 379. 2. Ld. Ray. 3. and Trin. 2. Co. 2. 1. Tidd's Practice, 230. Rule of Court, Trin. 12. Will.

Case 1003.

Anonymous.

An indictment for stealing ten pounds in money numbered, is good.

EYRES moved to quash an indictment for taking away goods of A. to the value of ten pounds in money numbered:

And THE EXCEPTION was for the incertainty of what is meant by the word "*pound*," whether pound weight, or pound sterling.

But PER CURIAM, Pound of money is of known signification in law, and the term used in all originals: "*Præcipe A. quoddam reddat B. cent. lib.*" and so are the conclusions of writs and counts, *ad damnum. cent. lib. &c.*"

And he took nothing by his motion.

Case 1004.

Vincent against Prestop.

When a plea begins with a *quoad*, it is restrained to what that refers to, and shall not be extended further.

S. C. post. 667.

PLAINTIFF declared on two several promises of fifty-five pounds: defendant pleads that *quoad* the first fifty-five pounds plaintiff *actionem habere non debet*, because there was but one fifty-five pounds due at the time of several promises; and that the several promises were for that one fifty-five pounds, and that after the several promises he paid the said fifty-five pounds; and concludes in bar of the action generally.

And PER CURIAM, If you had said thus, that "*actio non, &c.*" without the "*quoad*," it had been well; but here you lay your plea to the first fifty-five pounds by the *quoad*, and * though your conclusion be general, yet it shall not enlarge the plea, which is restrained in its beginning. And if trespass be brought for assault, battery and wounding, it would not suffice to answer the wounding; for the one may be without the other, *viz.* the battery without the wounding. And they all agreed, that when one begins his plea with a *quoad*, he thereby restrains it to what the *quoad* refers to; and though the matter of the plea be such as would go to the whole, and the conclusion be general, yet it shall not go beyond the matter to which the *quoad* refers.

Cole

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Cole against Acorn.

Case 1005.

IN DEBT against a sheriff, the plaintiff declared upon a judgment obtained against J. S. and had sued out a *feri facias* and delivered it to the defendant, who *virtute* thereof had levied the money. The defendant pleads *nihil debet*, and adjudged a good plea. And this difference was taken, that where the writ has not been returned, the plea is good, because it is matter of fact whether he has levied the money or not; *secus* where the writ is returned *feri fecit*.

Nil debet is a good plea in debt for money levied on a *fi*.

Cio. Eliz. 756.

1. Lev. 3.

Salk 565 284.

Skin. 17.

Ld. Ray. 1500.

5. Com. Dig.

Stra 701 778. 2. Will. 10. Fort. 363. 367. 2. Burr. Rep. 820. 1024. "Pleader" (W. 17.).

The King against Emmery.

Case 1006.

THE DEFENDANT having been acquitted upon an information moved for costs, and had them; and the difference is, where the Judge, who tries the cause, certifies probable cause of prosecution, and where not (a).

Person acquitted on information had costs.

3 Burr. 1817.

1819.

Hullock on

Costs, 574.

(a) See the statute 4. & 5 Will. 3. c. 18. Rex v. Woodfall, 2. Stra. 1131. Rex v. Davis, 4. Hawk. P. C. 7th edit. ch. 26. s. 10 accord. But he is not entitled to costs beyond the extent of the recognizance, Rex v. Filwood,

2. Term Rep. 145. Rex v. Brooks, 2. Term Rep. 197. and to deprive the defendant of costs the certificate must be entered on the *posse*, Wilson v. Crabington, Comb. 345.

Peters against Benning.

Case 1007.

A WRIT OF ERROR *ad proximam sessionem* in parliament, and before that time the parliament by proclamation was dissolved, and day fixed for the meeting of a new one.

Writ of error *ad proximam sessionem parliamenti*, and before that time it was dissolved, and day fixed for the meeting of a new one, and Term intervened, whether a

And upon motion THE QUESTION was, Whether this writ were a *superfedeas* of execution, or even could be a warrant to send up the record to the new parliament, there being no Term intervening between the return of the writ and the time fixed for the parliament's meeting?

superfedeas of execution. Per HOLT, The record is not removed.

And FIRST, It was * agreed on that the Court can take no notice of any extra-judicial determination or order of the lords. * [605]

And per HOLT, Chief Justice, If an impeachment be in one parliament, and some proceedings thereon, and then the parliament is dissolved, and a new one called, there may be a continuance upon the impeachment (a); and he quoted the case of *James v.*

If proceedings be on impeachment, and parliament be dissolved, may proceed in another parliament.

(a) The question relative to the nature and continuance of parliamentary impeachment was very elaborately discussed in the Case of Warren Hastings, Esq in the house of commons on a motion made the 17th of December, 1790, and afterwards in the house of lords; and it was determined in both houses, that a dissolu-

tion of the parliament does not discontinue an impeachment. See a very full account of this case, 1. vol. of Mr. Sergeant Runnington's 5th edit. of Hale's Hist. Com. Law, Note (), page 67 to 127; and "The History of the Trial of "Warren Hastings," Part IV. published by Debrett, 8vo. 1796.

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PETRE
against
BENNING.

If Term inter-
venes between a
prorogation, ex-
ecution may be
sued

Vide 1 Vent.
31. 100.
1. Mod. 106.
1. Sid. 44. 45.

Vide Dy 375.

1. Jo. 66.
Transcript of
record is only
before the lords
in writ of error.

The king's writ
runs not to Ire-
land.
Ante, 225.

If writ of error
be left in the
lords, and there
be a dissolution,
it is a *superfedeas*,
but the writ of
error is not dis-
continued.
Vide 1. Vent.
31.

• [606]

Bertly (a), where a writ of error was *tested* the fourth of May, returnable the nineteenth of November following, to which time the parliament was prorogued, so that a whole Term intervened; and he said it was his opinion they might sue out execution notwithstanding that writ. And he remembered to have known it ruled in *Keeling* and *HALE's* time, that a writ of error was no *superfedeas*, after a prorogation, if a Term intervened. Vide 3. *Kob.* 416. 1. *Vent.* 266. And the case in 2. *Cro.* 341. was said to be in point, that a writ of error, and all the proceedings thereon, are determined by the dissolution of a parliament. Vide *Lane*, 57. 1. *Hen.* 7. 19, 20. *pl.* 50. *Br. Err. pl.* 25. that the plaintiff in error is not bailable in parliament for two reasons; one, that if the judgment should be affirmed, they could not award execution on the recognizance; secondly, if the parliament should be dissolved before any thing done, all matter depending before the parliament would be thereby determined. Likewise a transcript of the record, and not the very record itself, is before the lords upon a writ of error; and in that it differs from a writ of error from *Ireland*, or from the common pleas into this court, where in the one case the execution is to be awarded here, but in the other case it is not so for the necessity of the thing, because the king's writ runs not into *Ireland*; the course is to send a mandate to THE CHIEF JUSTICE of *Ireland* to grant execution. Vide *Jo.* 66 (a). that dissolution determines error actually depending. *Ray.* 5. that a prorogation and a whole Term intervening, is a *superfedeas* of a writ of error in parliament; and so of a dissolution, though the errors had been assigned. If before the transcript be left above, the parliament was dissolved, the writ was no *superfedeas* of execution; but if it had been left above, the dissolution would be a *superfedeas* of it; but the writ of error would not be discontinued, there being a day certain for the meeting of a new parliament, by the very act of dissolution. It may be a question, if a writ of error *ad proximum parliam.* when a parliament is to meet at a day certain, be a *superfedeas*, though a Term does not interpose between the *teste* of the writ and the time fixed for the meeting * of the parliament by the dissolution of the former parliament; but the Chief Justice said, that as the present case was, the writ in question could not be an authority to carry up the record, neither could the lords be legally possessed of it by virtue of that writ. And he said, in case of prorogation, the writ of error was returnable *ad præsens parliamentum*; but in case of adjournment it was *ad præsent. session.*

And after all here THE COURT left them to do what they could by law.

(a) Easter Term, 5. Will. & Mary.
James v. Barkley, Comb. 206.

(b) But see now the Statutes 28.
Geo. 3. c. 28. and 23 *Geo.* 3. c. 53.

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Paulhill against Powell.

Cafe 1008.

HE was one of the five *Kentish* petitioners who petitioned **THE COMMONS** in an insolent manner to grant taxes, in order to war against *France*; and being ordered into custody of their serjeant, he now brought an action of the case against him for not shewing him a copy of his commitment within six hours after, according to the *Habeas Corpus Act*.

Whether commitment by either house of parliament be within the *Habeas Corpus Act*.

And upon motion in the case,

HOLT, *Chief Justice*, said, that one may, upon this act, plead *nihil debet*, and give the special matter in evidence in debt upon this statute (a); and he said **THE COMMONS** never commit but by vote, or a warrant under the Speaker's hand (b). And whether the *Habeas Corpus Act* extended to commitment by either house of parliament, would be examined hereafter (c).

And he said, one may apprehend without a warrant, but not commit without a warrant in writing; and the difference is between apprehending and committing, that the one is in order to the other, that is, the apprehending is in order to carry before a magistrate who has power to commit.

A commitment must be by warrant in writing.

- (a) See 5. Com. Dig. (2. V. 6.). 144 to 159. and 3. Hawk. P. C. 7th edit. ch. 15. s. 73. and the cases there collected in note page 229.
(b) See 11. St. Tr. 307. 312. 320. 323.
(c) See Lord Shaftsbury's Case, 1. Mod.

Waldegrave's Case.

Cafe 1009.

A DECLARATION was delivered on *Trinity Sunday*, and it was debated on motion, whether such delivery were not void by the statute of 29. Car. 2. c. 7.

A declaration cannot be delivered on a Sunday.

And per **HOLT**, *Chief Justice*, Strongly it is; for **FIRST**, It is no act of necessity within the meaning of the statute, as putting of ecclesiastical process upon the church door (a), or making a tender to save a penalty. And he said, he would take the word "process" for "proceeding," and such construction as tends to a better observation is to be made: And this declaration, as delivered, could not be taken notice of without breaking of the *Sabbath* till *Trinity Term*; for * that by the statute of 32. Hen. 8. c. 21. begins on *Monday*; but *Quind. Pasch.* is indeed always on the *Sunday*, but is kept on the *Monday*. And per **LUV**, If an arrest of a person, that skulks all the rest of the week, be void on *Sunday*, à fortiori this will be.

- Cro. Eliz. 227.
1. Leon. 328.
Fort. 373.
1. Black. Rep. 526.
5. Mod. 449.
1. Ld. Ray. 705.

* [607]

But **GOULD et POWIS**, *Justices*, dubitabant (b).

- (a) Allen v. Brookbank, Salk. 625. 5. Mod. 450. Carth. 504.
(b) In the Hilary Term following it was determined, that the service of a declaration in ejectment on a Sunday is void, Taylor's Case, post. 667. S. P. Walker v. Town, Bar. K. B. 30c. and

in Easter Term 31. Geo. 3. in the common pleas, it was determined that service of notice of declaration on a Sunday is bad, though the defendant accept it, knowing it to be irregular, Morgan v. Johnston, 1. H. Bl. Rep. 628.

Anonymous,

Michaelmas Term, 13. Will. 3. In B. R.

Case 1010.

Anonymous.

Hands, of persons beyond sea admitted to be proved. Ante, 521. **PER HOLT, Chief Justice**, at *nisi prius*. In debt upon a bond upon issue of *non est factum*, if the plaintiff prove the witnesses dead, beyond sea, or that he has made strict enquiry after them, and cannot hear of them, he shall be let in to prove their hands.

Case 1011.

Anonymous.

Justices cannot order whipping without oath made. **HOLT, Chief Justice**, with indignation, asked why actions are not brought against justices of peace who order people to be whipt in *Bridewell*, without oath made before them, or power to convict.

Case 1012.

Anonymous.

"Yeoman of the Black Rod" is deputy to the Usher of the Black Rod." **IN assumpsit** for money received to the plaintiff's use, the question at the trial was, Who was the rightful *Yeoman of the Black-Rod (a)*?

And it was said he was an officer under the *Usher of the Black-Rod*, and in nature of a deputy to him, and therefore to be nominated by him; and it was compared to the case of sheriff, who alone may make his own under-sheriff.

The office of *Usher of the Black-Rod* is by patent. **IT WAS AGREED**, that the usher himself is created by the king, and is a patent officer under the Garter seal; and so is the clerk of the lords.

The grant of an office in reversion void. **And per HOLT, Chief Justice**, If the king grant an office to commence after the death of *A.* who has nothing in the office, it is void.

Sign manual. **NOTE:** The privy signet, or sign manual, is nothing but the king's signing his name "*W. R. x.*"

(a) See Sir William Saunderson v. *rard*, 1. Show. 78. Comb. 163. Holt, Signal, 2. Stra. 747. Duppa v. Ger- 584.

HILARY TERM,

The Thirteenth of William the Third,

IN

The King's Bench.

Sir John Holt, Knt. Chief Justice.

Sir John Turton, Knt.

Sir Littleton Powis, Knt.

Sir Henry Gould, Knt.

} *Justices,*

Edward Northey, Esq. Attorney General.

Sir John Hawles, Knt. Solicitor General.

• [608]

• Ballard *against* Gerrard.

Cafe 1013.

THE REGISTRER of a spiritual court libelled there for certain fees belonging to his office, as for a groat for every oath administered, and other small fees accruing to him in the exercise of his office; and proceedings carried to an excommunication.

Suit cannot be in the spiritual court for the fees of a registrar.

S. C. 1. Ld.

Ray. 703.

S. C. 1. Salk.

333.

S. C. Holt. 596.

1. Mod. 167.

5. Mod. 238.

242.

4. Mod. 254.

1. Salk. 333.

Skin. 589.

Com. Dig.

"Prohibition"

(F. 5.).

2. Stra. 1102.

Dougl. 629.

And prohibition was moved for, upon suggestion that the office of a registrar is a temporal office, and by consequence matters concerning the fees thereof were only cognizable at common law.

And though it was objected to be for fees accruing for the necessary exercise of his office in court, which fees were his sole recompence; and so small from every particular person, that to put him to an action at law, would be in effect to deprive him of them entirely; and some of them may be such, for which there may be no remedy at law, as in case of the box money of this court, or the fees of a door keeper; and as to the *quantum* of them, they are assessed by the Court; and any court, ancient or new, that have necessary officers, may ascertain fees to them, and all those that use the court shall be concluded thereby; and yet those fees may be so small from each person, that it may not be worth while to bring an action at law for them; and it was said, if one refuse to pay the fee

of

Hilary Term, 13. Will. 3. In B. R.

BALLARD
against
GERARD,

of the door-keeper, the Court would commit him, and that was the only remedy:

• [609]

HOLT, Chief Justice, contra. As to your case of the box money, he shall not have the rule if he do not pay for the box; and we cannot justify committing one for not paying of fees, and surely there must be an original legal remedy, if there be right; and surely the office of registrar or * archdeacon is a freehold, for which an assise will lie; and if so, a denial of the reasonable and usual fees thereof will be a disseisin of his office. And no court has a power of settling the fees of its officers, so as to conclude the subject; but thus far they may go, as to judge what are reasonable fees; and in a *quantum meruit* by the officer for such fees, the Judge's assessing them reasonable may be good, but not conclusive evidence to a jury; and so of the table of the usual fees of a court not newly erected; and after it is once found reasonable by a jury, then it may become conclusive evidence; and so it has been adjudged, in the fifteenth year of *Charles the Second*, between *Beal and Prior*; for the fees of the registrar of the Office of Insurance; *vide Hard.* —However, he thought it very proper for a prohibition, to have it settled judicially. And he said, he would never grant a *mandamus* to swear the registrar of the spiritual court, or an official, but would put them to an *assise*. And he said, it were very unreasonable to suffer the spiritual Judge to determine the right of lay persons; and he had known an official obtain a prohibition when they would sue him in order to a deprivation below, though contrary to the case of *Sutton's Hospital*; and none could be concluded, as to a temporal right, by the opinion of the spiritual court.

Vide 1. Vent. 365.

1. Vent. 111.

1. Vent. 164.

And here a prohibition was awarded (a).

(a) See *accord.* Horton v. Wilson, 255. Johnston v. Lee, 5. Mod. 242. 1. Mod. 167. 1. Frem. 129. 3. Keb. Pitts v. Evans, 2. Stra. 1108. 13. Vin. 203. Johnston v. Lee, Skin. 589. Abr. 155. Pearson v. Campion, Doug. Johnston v. Oxenden, 4. Mod. 254, 629.

Cafe 1014.

Anonymous.

Feme may plead
non est factum.
Salk. 675.

HOLT, Chief Justice. Though a *feme covert* seal and deliver a deed, yet she may plead *non est factum*, and give coverture in evidence (a).

(a) See 1. Salk. 7. Mod. Cases, 311. 3. Term Rep. 627.

Cafe 1015.

Anonymous.

Bill of excep-
tions no *super-*
sedes.

A BILL OF EXCEPTIONS is no *superseas* of a judgment; but the way is to bring *writ of error*, and assign the exceptions for error (a).

(a) See Cro. Car. 341. 1. Bac. Abr. 325. 2. Lev. 237. Rex v. Inhabitants of Preston, Burr. S. C. 77.

Anonymous.

Hilary Term, 13. Will. 3. In B. R.

Anonymous.

Case 1016.

A DEFENDANT shall have no costs upon judgment for him in demurrer in abatement (a). Anst., 195. 323.

(a) See 8 & 9. Will. 3. c. 11. f. 2. Hullock on Costs, 150. Artley v. Younge, Thomas v. Lloyd, Salk. 194. Id. Ray. 2. Burr. 1232. Cook v. Sayer, 2. Will. 336. Garland v. Extend, 6. Mod. 38. 85. 2. Burr. 753.

Anonymous.

Case 1017.

IN EJECTMENT, if there be no tenant in possession to be served with declaration, the plaintiff must go the old way of signing declaration on the premises (a). Ejectment when no tenant in possession.

(a) See accord. Lilly's Pract. Reg. 499. Legal Remedy by Ejectment, page 148. 5. Burr. Rep. 2830. 1. Salk. 255. But see 4. Geo. 2. c. 28. Run. Eject. 2. Stra. 1064. and Mr. Sergeant Run- 155. 160. as to the mode of proceeding nington's History of the Principles and in the case of a vacant possession when Practice, Ancient and Modern, of the half-a-year's rent is in arrear.

* [610]

* Fenwick against Lady Grosvenor.

Case 1018.

HE LIBELLED against her in the Spiritual court for cohabitation, claiming a marriage with her. A citation served on a person residing occasionally in London, is good.

A prohibition was moved for, upon suggestion that the citation was to answer out of the diocese, it being to the ecclesiastical court of peculiar of *Westminster*, whereas she lived in *Chesham*.

But it appearing by affidavit, that she dwelled for a considerable time in *London* diocese, and even to the very day of the citation, which was served upon her just as she was going away; THE COURT would not grant a prohibition.

Anonymous.

Case 1019.

HOLT, Chief Justice. FIRST, In inferior courts the course is to enforce an appearance by distress, and that ought to be reasonable. Appearance may be enforced by distress.

SECONDLY, If a *rescous* be made to a reasonable distress, the steward may impose a fine for it. Steward may fine for *rescous*.

THIRDLY, It would be too much to distrain goods to the value of the debt demanded. Distress ought not to be to the value of the debt.

FOURTHLY, The officer cannot justify the breaking an house to take such distress. Officer cannot break doors.

And FIFTHLY, Though inferior court may grant other process out of court, yet cannot they grant an *attachment* on contempt but in court. Attachment for contempt must be granted in court.

Anonymous.

Hilary Term, 13. Will. 3. In B. R.

Cafe 1020.

Anonymous.

Judge of nisi prius only assistant in writ of enquiry. **HOLT, Chief Justice.** A Judge of *nisi prius*, upon trial of a writ of enquiry, is only an assistant to the sheriff, and has no judicial power; and if the parties come to any agreement, there the way to make it effectual is to bring it to him to sign; and afterwards move above to have it made a rule of Court.

Cafe 1021.

Anonymous.

Lease at will may be determined by either party. **HOLT, Chief Justice.** If one make a lease *at will* from year to year; either party may determine it at pleasure, at the less of the accruing rent to him that determines his will (a):

Notice must be given to determine a lease from year to year. But if one make a lease for a year, and so from year to year, as long as both parties shall please, this is a lease for one year absolutely; and if the lessee continue on the first day of the second year, he is bound for another year; so is the lessor, if he has not warned him away before the beginning of the second year (b).

A parol lease for three years to commence in futuro is void. And a lease for three years to commence *in futuro*, by parol, is not warranted by the statutes of Frauds and Perjuries (c).

(a) See Litt. sect. 68. Co. Lit. 55. 2. Bl. Com. 146, 147. 1. Sid. 339. Salk. 414. 2. Black. Rep. 1173.

(b) The notice necessary to determine a tenancy from year to year, is *half a year*, Dagget v. Snowden, 2. Black. Rep. 1224. for *six months* notice is not sufficient,

Walker v. Constable, 3. Will. 21. and this notice must be to quit at the end of the year, Flower v. Darby, 1. Term Rep. 159. See also 2. Bro. C. C. 161. Cowp. 243. 1. H. Bl. Rep. 311. 4. Term Rep. 361. 464.

(c) See 29. Car. 2. c. 3. § 1.

• [611]

Cafe 1022.

• Ingram against Foot.

A plea to an action by bill, that after the commencement of the action M. M. exhibited a bill and recovered judgment against the defendant as administrator, &c. and that before the said bill of the said M. M. the defendant had fully administered, does not shew that the defendant had administered before the commencement of the plaintiff's action. **DEBT UPON A BOND** against an administrator, who pleads in bar a recognizance in such a sum entered into by his intestate at such a day, for the appearance of J. S. such a day in such a court, and that the said J. S. did not appear, whereby the recognizance was forfeited, and that his intestate was indebted by bond to Mary Meade in such a sum, who in Hilary Term, ann. 8c. sued the defendant, and obtained a judgment against him in this court, and that he had not assets beyond what would satisfy the said two sums *tempore exhibitionis billæ præd. Mariæ prædictæ. aut unquam postea*; to which the plaintiff demurs.

And two exceptions were,

FIRST, That it appeared the plaintiff's suit was commenced in Michaelmas Term, before the exhibiting of the bill of the said Mary; and the defendant does not deny his having of other assets than which he might have waited by Hilary Term.

before the commencement of the plaintiff's action.—S. C. 1. Ld. Ray. 708.

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To this it was offered for answer, that there was no express mention made of any bill exhibited by *Mary*, but only *quod eum implacitasset*; and though that being in debt in the king's bench, it must necessarily be by bill: and though the words "*Maria præd.*" would tie it up to *Mary's* suit in *Hilary Term*, yet since there was no bill of *Mary's* mentioned before expressly, the words would be rejected, and then it would be *tempore exhibitionis billæ*, and that must be the plaintiff's bill.

INCERAM
against
Foot.

But it was ANSWERED and RESOLVED, that in truth it could not refer to *Mary's* bill, for no such bill was mentioned before; and then it was worse, for it referred to nothing; and then no time is fixed when the defendant had no other assets.

And this diversity was put by BROTHERICK, when a thing shall be rejected for repugnancy, and when not: When subsequent words make a thing, well explained and perfect before, nonsense, there such words shall rather be rejected, than that what was well before should be made nonsense; but where by the subsequent words the thing is made good sense, but altered in its nature from what it was before, they shall not be rejected.

THE SECOND EXCEPTION was, That by the statute of 4. & 5. *Will. & Mary*, all recognizances are pardoned, except such as were before assigned to THE LORD ALMONER, and this being a general act of pardon, and concerning the king's revenues, therefore the Court will take judicial notice of it; and here * being a general pardon of all recognizances, this recognizance is thereby to be judged pardoned *prima facie*, if it be not shown to be within the exception; and that is to be done by them that would take advantage of it. And if it should be said, that the recognizances assigned to THE LORD ALMONER, being excepted, were not pardoned even *pro instanti*; as in case of proviso, and then the plaintiff, being the party to take advantage of the statute, ought to shew it:

Courts cannot take notice *ex officio* of private acts of parliament.

1. Ld. Ray. 30.
390.
1. Bl. Com. 86.

* [612]

This diversity was taken by BROTHERICK upon that rule, that he that will take advantage of an act of parliament with an exception, must shew himself out of the exception, *viz.* if the exceptions be of persons, the rule holds; because the Court, upon reading of the statute, cannot know whether he be the person excepted or not; and therefore the party, who knows himself best in that case, must shew himself out of the exception; and it is an advantage given by the statute to such as are not disabled to take it by the exception: but if the exception be of offences, of which the Court may be informed by reading the statute, he that pleads the statute need not say, that it is an offence not excepted; and for this he quoted *Noy*, 99. *More*, 619. And he urged the opinion of *Poph.* 93. where, upon consideration of the statute of 31. *Eliz.* c. . . all Jesuits are ordered to leave the kingdom on pain of high treason, by such a day, except they are retarded by stress of weather; it was held, the better way of framing an indictment thereon, would

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would be to do it generally, and let the defendant bring himself within the proviso, it being for his advantage. *Vide* also the case in *More*, 303. Outlawry pleaded to debt; replication of the thirty-first of the queen of General Pardon; and *scire facias*; and returned, that the plaintiff, at whose suit the outlawry was, was dead, and that judgment was *quod est inde sine die*; and yet there were exceptions in that statute, and the plaintiff did not shew himself out of them; so there is not that strictness required in pleading an act of parliament upon a collateral matter, as when it is directly pleaded against the king.

But *per* HOLT, *Chief Justice*, That plea depended upon the validity of the judgment in the *scire facias*, which though it were erroneous, yet was well while it stood.

• [613]

To THIS it was answered, that acts of pardon are in the nature of the king's grant to the subject, and therefore not to be taken notice of, except they be pleaded; and there are abundance of authorities, that he that is to take an advantage of an act must shew himself out of the exception of it; and here it is the plaintiff that is to take advantage * of the statute. *Vide* 3. *Inst.* 234. settles the law in this case; for if the act be a general act of pardon absolute, and without exception, the Judges *ex officio* must take notice of it; but if it has any exception or qualification either of persons or offences, he that would take advantage of it must plead it, or else the Judges can take no notice of it.

HOLT, *Chief Justice*. If a man be indicted of murder or felony, he may plead "not guilty," and give a pardon in evidence; but if he have occasion to plead a pardon in bar of any collateral matter, there he shall not plead to issue, and give the pardon in evidence; as if a *scire facias* were brought upon a recognizance, there you must plead the pardon. And he agreed, that if the act had directed that no process should issue upon recognizances pardoned by this statute, a *scire facias* could not be made out upon this recognizance, without suggesting that it was excepted. And he said, they could not take notice of a general act of pardon with exception judicially, without its being pleaded specially, if the act itself did not expressly ordain it. And he agreed there were many authorities, that he that pleads an act of pardon should shew that he was not within the exception of the act; which *vide* 3. *Inst.* 234. Yet he could not think it necessary to do it, if the very purview of the act be not qualified and restrained; for if there be first general words of pardon, and after comes a proviso or exception, the natural way is to plead the pardon generally, and then the king's attorney, upon view of the pardon so entered on record in the plea, to shew that the party is within the exception. And whereas it is urged that this act concerns the king's revenues, therefore it is a general law; the difference *PER LUY* is, when an act concerns the king's revenues, for the king's advantage it is general, and judicial notice to be taken of it; *facit* where

1. Cro. 32.
More, 770.

Vide 1. Cro.
449.
26. Hen. 8. 7.
4. Hen. 7. 8.
Vide 1. Vent.
234. *simile*.

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where it concerns it in order to a diminution thereof to the advantage of particular persons. And an act of parliament may be general in part, and particular in other part. And when an executor pleads a recognizance, he must set it forth to the Court, that the Court may see whether it be to be performed or not; but if it be a debt, they only need say, that a judgment was obtained against him in such a court, if it be in any of the courts at *Westminster*; but if it be in an inferior court, they must give it jurisdiction, and say that *taliter processum fuit, &c.*

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against
Foot

And here the plaintiff had judgment upon the first exception.

* [614]

* Anonymous.

Case 1023.

HOLT, Chief Justice. One cannot stay proceedings upon Bail-bond, bail-bond till other bail put in and justified, if excepted against.

Anonymous.

Case 1024.

HOLT, Chief Justice. It will be hard to let money be brought into court upon a *quantum meruit*, and thereby to put the plaintiff to carry on his suit at the peril of costs; but the way is to confess the employing, and that he deserved but so much, and to plead a tender thereof, for then the plaintiff may reply that he deserved more, and so come to issue; but because in most declarations there are *quantum meruits*, even in an *indebitatus*, there it may be brought in upon the *indebitatus* count, and that will affect the other; and so it was done (a).

Money not brought into court on a *quantum meruit*, but in *assumpsit* may, which will affect the *quantum meruit*.
3. Lev. 440.
Burr. 1120.

(a) The rule is, that where the sum demanded is a *sum certain*, or capable of being ascertained by *mere computation*, without leaving any other sort of discretion to be exercised by the jury, it is right and reasonable to admit the defendant to pay the money into court, and

have so much of the plaintiff's demand upon him struck out of the declaration. *Per Lord Mansfield* in *Hallet v. East India Company*, 2. Burr. Rep. 1120. But for the particular cases in which it has been allowed or refused to be brought in, see *Sellon's Practice*, 1. vol. 303.

Lord Cornwallis's Case.

Case 1025.

IN my Lord Cornwallis's Case in chancery, which was this: The said lord, upon his intermarriage and settlement of his estate, raised a lease for years to trustees for the raising of six thousand pounds as he should appoint; three thousand pounds thereof to be at his own absolute disposal, the other towards provision for his younger children; he in his life-time assigned the said three thousand pounds to trustees, for a collateral security of a lease of ninety-nine years, which he made, and that the said trust should remain during the term; he had one younger child; he by will S. C. Tothil, taking notice of the new trust for the three thousand pounds, or-

If money be as a collateral security for a term, it shall be discharged in reasonable time, unless a time for its continuance be fixed.
S. C. Tothil, 284.

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ders

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LORD CORNWALLIS'S CASE. ders the whole six thousand pounds to be raised within a year after his death; and three thousand pounds to be paid to his executor, in trust for the said daughter, and bequeathed her the other three thousand pounds, subject to the said collateral trust.

If money is to be raised at a certain time, it must be done; but if no time fixed, and may be raised out of profits, sale shall not be.

In this case my Lord Keeper WRIGHT said, if the three thousand pounds had been made a collateral security generally, the Court would discharge in reasonable time, as here in seven years time, if the party did not shew probable cause of fear of eviction, and shew by whom; but this being expressly ordered to continue, they could not do it.

SECONDLY, That if there had been no time limited for the raising this money, and the lady, to whose use it was, so young that a speedy raising of it was not necessary, and that there was a sufficient estate out of the profits, whereof it might be raised without sale; the Court would not in that case decree a sale; but here, the time being expressly fixed, there must be a sale, rather than it should not be then raised.

AND SO IT WAS DECREED; and three thousand pounds to be paid to executors, and three thousand pounds to the trustee of the lessee, to stand his security, to be laid out at interest * on such security as the Master should approve of, liable to the lady's claim, in case there should be no eviction.

* [615]

Cafe 1026.

The King *against* Clark.

Information for building locks on the river Thames.

Noy, 403.

11. Mod. 3.

1. Lutw. 167.

3. Bac. Abr. 686.

2. Stra. 1247.

2. Hawk. P. C.

ch. 75. f. 11.

mis.

AN INFORMATION was filed against *Clark* for building of locks on the river *Thames*, to the obstruction of navigation.

And per HOLT, Chief Justice, To hinder the course of a navigable river is against *Magna Charta*, c. 23. and anything that aggravates the fact, though not directly to the issue, may be given in evidence upon it; as here the taking of money to let people pass. And it is no exception to a witness here, that he contributes to carry on the suit, or that this public nuisance was to his private nuisance.

Cafe 1027.

Blackborough *against* Davis.

If administration be granted to the grandmother of an intestate, the Court will not grant a

mandamus, on the application of an aunt of the deceased, in order that administration may be granted to her, although she is nearer of kin, and although the spiritual court is bound to calculate proximity of blood by the rules of the *common law*, and not by those of the *canon law*; for they will presume the administration rightly granted; but the next of kin may bring a citation to repeal the letters of administration.—S. C. 1 Salk. 38. 251. S. C. Holt, 43. S. C. 1. Ld. Ray. 684. S. C. 1. Peet. Wms. 41. S. C. Comy. Rep. 96.

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THE NIECE died intestate, and administration was committed to the grandmother.

And now BRODERICK, in behalf of an aunt, moved for a *mandamus* to the spiritual court to grant it to her, as being, as was

mandamus, on the application of an aunt of the deceased, in order that administration may be granted to her, although she is nearer of kin, and although the spiritual court is bound to calculate proximity of blood by the rules of the *common law*, and not by those of the *canon law*; for they will presume the administration rightly granted; but the next of kin may bring a citation to repeal the letters of administration.—S. C. 1 Salk. 38. 251. S. C. Holt, 43. S. C. 1. Ld. Ray. 684. S. C. 1. Peet. Wms. 41. S. C. Comy. Rep. 96.

pretended,

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pretended, next of kin, viz. a degree nearer than the grandmother. AND HE URGED, that in all cases, except where there are many in equal degree, where the ordinary may choose to which of them to commit, he is bound by the statute to grant it to the next of kin. And that if he grant it to any other, he goes beyond his authority, and his grant is void; and he may, without any repeal of such grant, commit it to the right person; and for this he quoted *Owen*, 50. 1. *And*. 303. 2. *Brownl.* 119. And if there be any present impediment in the next of kin, as if he be attainted, *non compos*, &c. in respect of which administration may be well granted to the next after him; yet upon removal of such incapacity, the ordinary of right is to repeal the administration, and that without any appeal to a superior Judge, and grant it to the right person. 1. *Sid.* 373. So if he to whom it is committed become *non compos*, or otherwise incapable, he may repeal in like manner, and grant them to the next of kin after. 3. *Cro.* 163. *Goldsb.* 119. *Dy.* 369. So since now by the statute of 21. *Hen.* 8. c. 5. it is the duty of the ordinary to grant the administration to the next of kin, and who such next of kin is shall be determined by the common law, and not by their law below (a); and if he do not duly execute his duty, the only remedy for the party grieved is, to apply for aid to the temporal court for the king's writ to command him to execute his authority as he ought to do, according to the statute. And it cannot be objected, that such a *mandamus* would in effect be to command a Judge to act contrary to his judgment, for it is no more than to command them to execute the statute; and it is one of the points in the case in 1. *Sid.* 371. that the ordinary might repeal or revoke an administration, and grant it anew.

BLACKBRO-
ROUGH
against
DAVIS.

Vide Raym.
506.

* [616]

SIR B. SHOWERS *contra*. They are judges below of the proximity of degrees; for it were absurd to make them judges of the matter, and not to allow them to judge it according to their own law. And there is no precedent that ever a *mandamus* went to command them to commit administration, when they had already granted it; and to say that administration once committed can in any case be merely void, is directly against *Packman's Case* (b). And to grant a *mandamus* here, would be to determine the right of a third person without his privity; for if a *mandamus* should go, and the Judge below will not return the truth, here will be a third person ousted of his right, without an opportunity of shewing it.

HOLT, *Chief Justice*. *Offley's Case* in *Siderfin* was an administration committed to one in equal degree, pending a *caveat*, without notice of him who had entered the caveat; and an appeal was brought to repeal it for that cause, and they below held that a good cause of repeal; and this was suggested for a prohibition here; and on demurrer the Court were divided, two holding, that it being granted to one next of kin, the ordinary had executed his autho-

(a) See 2. Bl. Com. 504. Prec. Chan. 593.

(b) 6. Co. 19.

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BOUGH
against
DAVIS.

1. Vent. 188.

Vide. 13 Co. 4, 5,

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Vide 3. Inst. 43.
etc.

Hob. 83. 191.
Noy, 24.
1. Cro. 62, 63.
201, 202.
Anst. p. 206.

rity well; but the other two, though he has granted it to the right person, yet it was unduly; so it does not affect this case one way or other. But here you seem to be too late for a *mandamus*: it is true, the construction of the statute upon the proximity of degrees must be according to the common law; and if they would go against it, your way would be to come and suggest that they are going to grant it to one more remote, and then move for a prohibition to hinder them from so doing; and then you might have a *mandamus* to make them grant it to the next of kin: nor is it unusual to oblige them to construe acts of parliament, which concern even things of pure ecclesiastical consueance, according to common law, or to prohibit them. For if they should libel to divorce two for kindred, who * are out of the degrees, it is very frequent to prohibit them; and yet nothing is more merely within their jurisdiction than marriage, yet because there is an act of parliament in the case, the construction whereof belongs to the king's temporal judges, we prohibit them in such cases. Now the granting of administration, in its nature, is of civil consueance, but allowed to them by the custom of *England*; and by that custom they had a discretionary power to grant to whom they would, and to recal it at will: but here comes an act of parliament which takes away this discretionary power; and if they do not confine themselves to that act, they ought to be prohibited. But now you are too late for that; for since they have granted it, we will give so much credit to them as to believe they have done it rightly; and if they have not done so, it must be undone by repeal; for since the statute of 31. *Edw. 3. c. 11.* the administrator has as absolute a property in the goods as an executor, who is in by the very will of the testator; and your authorities to the contrary are not law, for by the statute of 31. *Edw. 3. c. 11.* the ordinary is to grant the administration to the most loyal and loyal friends of the intestate; and nothing is said of the next of kin till the statute of 21. *Hen. 8. c. 5.* and that commands him to grant it to the next of kin, requiring the same; but neither statute does incapacitate him to grant it to any other, only commands him to grant it to next of kin, &c. And if the statute had deprived him of the power of granting to any other than to next of kin, then the grant to any other would be merely void; and consequently trover would lie against vendee of such administrator by the next of kin after administration granted to him, and that it does not, the authority of *Packman's Case* is in point. Suppose the next of kin do not ask for it, must not the ordinary commit it to another, or to the principal creditor? And if after the next of kin ask it, and the administration committed to the principal creditor is repealed, and granted to the next of kin, the principal creditor may retain any debt in equal degree; and all the dispositions made by him before the repeal shall stand. But if one who has no jurisdiction commit administration, it is void, and sale under such administration alters no property, but it is utterly void; but there is no manner of authority; but here is one, though limited. And since you stand till administration committed, your way was to appeal, and that would have

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have let you in; but now you have past the fourteen days, you have lapsed your time.

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And here at last * THE COURT directed them to bring a citation below, to repeal the administration; and if judgment be given against you in that, you may appeal; but still such appeal suspends only the sentence upon the citation, and still the administration remains in force; and the administrator may by virtue thereof dispose of all the goods in the mean time.

And so, *per* GOULD, *Justice*, it was adjudged in a case of *Sims* 2. Lev. 99. *v. Sims*, in *Hale's* time.

And *PER OMNES*, There is no colour for a *mandamus* till something be pending below, and that now can only be by citation; and if the nature of the thing will bear it, it may then be granted.

And it was said by THE CHIEF JUSTICE, that after administration committed, in no case could the ordinary compel distribution; and for that the statute of Distribution was made; and since the statute of 31. *Edw.* 3. c. 11. the ordinary is not answerable for any misdemeanor of the administrator, as he was before that statute; which shews he is no more his servant, and has no more to do with him; and that administration committed to one more remote in kindred, is not avoidable but by repeal, *vide* *Hetly* 48. But if the ordinary, without repeal of the first, should grant it to another, and then the first is repealed, from thenceforward the second is good. *Sir John Nedham's Case* (a).

And THEY ALL HELD, that if there be two in equal degree, the ordinary has his election who to grant administration to.

And HOLT, *Chief Justice*, remembered *Sir George Sands' Case* (b), who took out administration for his son; and afterwards, a woman pretending to be the son's wife, would have it repealed; and there, upon motion for prohibition, here it was held the ordinary, by committing it to the father, had executed his authority, for he had election which of them to grant it to. As also the case of *Duncomb v. Lacy* (c), which was after it in the common pleas. A *feme covert* had several debts due to her before marriage, which the law did not give to her husband; she dies, and her next of kin comes and takes out administration, the husband sues to have it repealed, and a prohibition is moved for, and granted; and all this appearing on the declaration, it was held the prohibition should not stand, but the husband ought to have the administration. And *Sir George Sands' Case* was held to be good law, for it differed from this; for by the statute of 31 *Edw.* 3. c. 11. the husband ought to have administration preferably to anybody; and is not within the statute of 21. *Hen.* 8, c. 5. because the husband is the

(a) 8. Co. 135.

(c) *Duncombe v. Mason*, as cited

(b) 1. Sid. 179. Ray. 93. 3. Salk. 23. S. C. 1. Ld. Ray. 685.

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* [619] best friend the wife can have : and it was also held, that a residuary legatee is to have administration before the next * of kin, because it appears, that the intestate, by making him residuary legatee, took him to be his best friend ; but the reason why the wife shall not have administration of her husband preferably to his father is, because she may marry, and so put herself and the goods in the power of another.

Aunt is not nearer of kin than grandmother, who being in the right line is to be preferred. And as to THE MAIN POINT, they all agreed at another day, when the case was moved again, and a citation pending below, that there was no room for a *mandamus* to prefer the aunt; and that she could by no means be said nearer of kin than the grandmother; and suppose them in equal degree, one being in the right line ought to be preferred to the other being in the collateral, *per* HOLT, Chief Justice.

AND PER LUY, The relation between grand-daughter and grandmother, and niece and aunt are equal ; and all the difference is that one is lineal, and the other collateral, and they are likewise mutual relations : and in pleading, if the son will make himself heir to the uncle, he must shew *coment*, and make the father a *medium* ; that is, that inheritance descends to him *ut consanguineo et hæredi*, viz. son of such a one, who is brother and heir to the uncle. And so in case of descent from the grandfather, you must do it in like manner by the father ; that it descends to him *ut consanguineo et hæredi*, viz. as son and heir to the father, who is son and heir to the grandfather. But brother and sister are in an immediate degree to one another, and for that need not mention the father in making title to each other ; and for this he quoted the great case of *Foster v. Ramsay* (a) in the exchequer. Two sons of an alien, born in England, one of them dies, the other shall be his heir, and making title he need not mention the father. But though brothers are in the same degree among themselves, they are not so as to a third person ; for if so, in case administration had been committed to the aunt, it should not be revoked, to have it granted to the mother.

Brother and sister are in an immediate degree, and in making title to each other need not mention the father.
2. Jon. 10.
Vaugh. 274.
2. Vent. 1.

This was all in *Easter* and *Trinity Term* last.

The spiritual In *Michaelmas Term* they moved for a *mandamus* to have distribution ; and to have it BRONERICK urged the words of the statute, which ordains a distribution to the next of kin to the intestate in equal degree ; and they will not controvert, but the aunt and grandmother are in equal degree to the niece. And it is plain they do not go according to the civil law, for by the *Nov. 118. 127. of fustin.* there ought to be distribution between the father and brother and sister of intestate, and they never allowed of any before the statute. * And we are but two degrees removed from the intestate, and so distant is the grandmother.

To which it was objected, first by Sir B. Shewers and *Cheeshire*, common-law Counsel, That the statute of Distribution was only

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(a) *Collingwood v. Pace*, 1. Sid. 193. 2. Keb. 601. *Carter*, 185. 2. Sid. 23. 51. 1. Vent. 413. 1. Lev. 59. 1. Keb. 65. 184. 2. Vent. 1. 1. Eq. Abr. 413. 374. 216. 535. 579. 585. 603. 670. 699. 3. Lev. 413. 350. *Vaughan*, 274. 2. Jones, 10.

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made to quiet the ordinary in his right of ordering a distribution, which undoubtedly did belong to him, and was exercised by him before the statute of 31. *Edw.* 3. and which he did continually claim; and according to the opinions of some eminent common lawyers, remained in him notwithstanding the statute. And since before the statute they were the sole judges who ought to have the distribution, and the new statute impowers them to order a distribution, it seems very plain the statute leaves it to them to judge who ought to have distribution: for it says it shall be according to the law in that case used, and that must be the law which they below did use to go by, and by their law the grandmother is nearer of kin than the aunt; or if it be not so, and it be adjudged so, the remedy is by appeal to a superior court; for the distribution of intestate's estate was always of ecclesiastical consueance before 31. *Edw.* 3. c. 11. whereby the property of the administrator is become absolute, subject to debts in their degrees, but exempt, according to the general opinion of the common lawyers, of any distribution. And the new statute, making them liable to distribution, does only restore things as they were; and a *mandamus* to grant distribution to the aunt, were expressly to oust the judge below of the jurisdiction the statute entrusts him with, *viz.* that of judging who is entitled to distribution; that is, of judging what are the next degrees, and next, who are in those degrees. The reason of a *mandamus* is, that this Court, in respect of its superintendency over all other inferior jurisdictions, is to see that they execute that jurisdiction that they are entrusted with; and therefore a *mandamus* to grant distribution to the next of kin generally, perhaps may lie, but never to do this or that particular thing; for that would directly oust them of the consueance and right of judging whether the party be entitled to the thing or not; for if they should judge not, and make that return to a *mandamus*, then the party might bring his action of false return against them, and the subject matter of their judgment below would be determined incidently here above; and if it should be judged contrary to the judgment here above, a peremptory *mandamus* would go; and so farewell their power of judging. * And since the statute of Distribution, administrator and next of kin is like executor and legatee, or rather they are executor and legatee in law. If therefore they shall judge who is made legatee in a will, and direct how a legacy shall be paid, without any particular *mandamus* of this Court; why may they not *à pari* judge who shall come in under the description of next akin? And if the *mandamus* should go, and they return that the grandmother is nearer of kin than the aunt, would an attachment go against them for not obeying the writ, contrary to their judgment grounded upon their law, which alone they are to be guided by, as knowing no other? And it never was heard of, that a judge entrusted with any judicial power was commanded to eat up his words, and proceed against his judgment; there are multitudes of precedents of appeals in such cases, but not one of either *mandamus* or prohibition; and that is evidence that

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hitherto appeals have been thought the sole remedy. And by the civil law the ascending and descending lines are always held nearer than collaterals: and this absurdity that would follow, to make judges pronounce against their own judgments, is the reason that upon a writ of error the superior court does reverse judgments of inferior courts, and give new judgments, if the nature of the thing requires it. Indeed, if they would proceed below to award distribution to one not entitled, there might be some colour for a prohibition; but where a judge below is to give judgment, and it is not yet known which way he will judge, to command him beforehand to do his duty, is very odd.

And DR. LANE, a *Civilian*, said, that if the father and mother of the intestate were living, they would be in equal degree; and by the civil law, upon death of father the grandfather becomes father in his stead; and the computation of degrees according to the canon law, was never received in *England* in respect to succession, but only in respect to degrees of marriage: and he agreed, that according to the canon law the aunt and niece were in the second degree, as well as the grandmother and niece; and the reason he said was, because the clergy who made the canons, considering the gain of dispensing with marriages within the four degrees, took care to make people as near akin as they could, and so contracted the degrees; but that according to the civil law the aunt and niece were in the third degree, and the grandmother and niece but in the second degree. And before the Novels of *Justin. Nov. ** 118. 127. the mother was to be preferred before brother or sister; and so should the grandmother, if the mother were dead, because she then was *in loco parentis*; but the severity of that law is corrected by those Novels, and the brother and sister let in in concurrence with the mother; and if the grandmother be in the second degree, surely the grandmother's daughter must be a degree farther. And he said, here in *England* the ancient civil law being planted by the *Romans*, and the Novels of *Justinian* not being found in the West till the thirteenth century, they never obtained in *England*. And the statute says, *pro suo cuique jure*: and what *jus* is that? Certainly it is the law by which we judge in point of succession, and that is the old civil law; and by the civil law brothers are in the second degree, for there is an ascent to the parent of one side, and a descent from him to the brother; so here there will be an ascent from the niece to her mother, and that is one degree, and from the mother to the grandmother a second degree, and from the grandmother to the aunt three degrees. Before the statute of 1. *Jac.* 2. c. 17. if there were father and mother having many children, and the eldest of the children had died intestate, the father or mother should have had administration, and ran away with all the estate, and leave the brothers and sisters nothing; but now by that statute the brothers and sisters are let into a distribution with the mother, but not with the father, for he shall even at this day run away with all.

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HOLT, Chief Justice. By our law administration is to be committed to father or mother of the intestate before his brother or sister, and that is the reason of *Ratcliff's Case*; and it is because the child proceeds immediately from the parent, and is otherwise of no kin to brother and sister than as they proceed from the parent; and if then the mother be nearer of kin than the sister, by 21. *Hen. 8. c. 5.* she ought to have the preference of administration; and by the same reason that the mother is nearer than the sister, the grandmother, being nearer to the mother than her own sister, the grandmother must be nearer to the niece than the aunt: and the words "next of kin" in the statute of 1. *Jac. 2. c. 17.* shall be construed in like manner as in that of 21. *Hen. 8. c. 5.* Before 31. *Edw. 3. c. 11.* the ordinary was universal administrator of all the intestates of his diocese, and then they did distribute to the friends of the intestate as they thought convenient, and some to holy Church; and though since that statute they have frequently claimed such a right, yet they were constantly prohibited *. And he said, that surely the brother and sister of the deceased must come in before the grandmother, and the aunt before the great-grandmother: and if administration were granted to the aunt, and they went about to repeal it below, in order to grant it to the great-grandmother, it were fit to prohibit them; for by the statute they are bound to confine themselves to degrees. And there are no precedents of distribution granted beyond children of brothers or sisters: and neither civil nor canon law, as such, are of any authority in *England*, but what gives them force, is their being received and acquiesced under here. And sometimes in the ecclesiastical courts they practise against the civil law, as in suits against parishioners to repair the church; for of common right, and by the civil law, the parson ought to do it.

Administration is to be committed to father or mother preferably to brother or sister.

So grandmother nearer to niece than aunt.

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Brother and sister nearer than grandmother, and aunt nearer than great-grandmother.

And now this Term he delivered the opinion of the Court thus: Vide Hob. 83, &c.

WE ALL HOLD it clear law that this point must be determined by the law of the realm, and not by any civil or canon law whatsoever. So we shall go upon the ancient laws and customs of *England*; and in order to that, we must consider what the ancient laws and customs of *England* were before, and at the time of the Conquest. And it appears, that by the law then used in *England*, all the descendants of a person dying intestate had preference not only in personal but also in real estates; for if a man had died, having three sons and a daughter, they all equally inherited his real estate; and this appears in *Seld. Eadm. 184. Lamb. Saxon Law, 66. Siquis intestat. decesserit liberi ejus hereditatem æqualiter dividunto.* But after the Conquest, the kingdom and constitution were to be new modelled; and this alteration was made in the time of *Henry the First*, and then the daughters were excluded if there were males; and it was by the thirty-sixth law of *Henry the First*, vide *Lamb.*

Right of administration to be determined by the law of the land, and not by civil or canon law.

By the old law of *England*, all the children, whether male or female, equally inherited.

In *Hen. 1.*'s time the daughters were excluded, if there were males.

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And if had no children, had gone to the father or mother.

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Between the reigns of Hen. 1. and Hen. 2. the father and mother were excluded, and to go to collaterals; but this alteration was only as to real estate.

202, 203, and then the males did inherit all alike, especially all the common socage men. But even then, if one had died without issue, and had a father or mother, the land should not go to any collateral, but to his father or mother; and this appears by the law of *Henry the First*, *Lamb. ubi supra, Siquis sine liberis decesserit, pater aut mater in hæreditatem succedat, vel frater aut soror, si pater et mater desit*; so the collateral was not to come in but upon failure of father or mother. And where 1. *Inst* 11. a. this is taken notice of as an exploded opinion; but *Coke* had not seen the laws of *Henry the First* then; and the Red Book in the Chequer, that * he contradicts, is very ancient, and of great authority in law. But this law did not continue long, but was altered between the reigns of *Henry the First* and *Henry the Second*, and the father and mother altogether excluded; and then the law came to be adjudged as it is to this day, that land should not ascend to father or mother, but rather go to collaterals; and this appears by *Glanville, lib. 7. 1, 2, 3, 4, c.* — But this alteration was only made as to real estates; and personal estates were left as they were: and father and mother, as to that, have preference to brother or sister of the intestates, and all other relations whatever, except the descendants of him; and it is plain that this remains so still, for that nothing appears in the Books of any alteration made in this point: so the law being so then, and not being altered since, but only as to inheritance, it must consequently remain so still; and therefore the father and mother of the intestate are to be preferred before brother and sister; and by same parity of reason, the grandfather and grandmother are to be preferred before uncle and aunt. Now as to the Authenticks of *Justinian*, *Nov. 112. c. 2.* that the brother and sister should come in for distribution with the father of the intestate; it is true, such a law was made in the latter end of *Justinian's* reign, and introduced and established pursuant to the practice in the prætorian court; and the law there is, that if one should die intestate, his estate should go to his parents, excluding all others, except brother and sister *ex utroque parente*; but if there were no such brother or sister, then that it should go altogether to the father or mother; and by that law, only brothers and sisters come in for a distribution; but by the express words of it all others are excluded; and the grandfather, and all those above, should come in before any in the collateral line. But I believe it will be hard to maintain that doctrine now; because the statute of Distribution gives it to next akin, and the great-grandfather is not so near as uncle; but surely the grandfather and grandmother is nearer, because the uncle and nephew, or aunt and nephew, or niece, are not otherwise akin, but as they derive their relation from grandfather and grandmother; and *per quod unumquodque est tale, illud est magis tale*, and therefore they are not now in equal degrees; and there is something of greater difference between them than the one's being lineal and the other collateral. * It may be said, that this is against the rule

* [625] given to the *Israelites* in the 27th chapter of *Numb.* ver. 8, 9, 10. where

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where it is directed, that if a man dies, having no son, his daughters be his heir; if there should be no daughters, his brothers; if no brothers, his father's brothers; so one would think the father is left out on purpose. But in fact it was quite otherwise; for notwithstanding any omission there, if one had died having no issue, but had a brother and a father, the father should inherit to his son; and so is *Selden de Successionibus apud Hebræos*, c. 12. And it is true, there is no mention in that law of the father, but by the constant practice the father came in before his brother, but the mother by that law never came in. And this case is not within the reason of *Justinian's* Novels before-mentioned; and admit it were, nothing of the civil law is admitted or obligatory here in *England*, quatenus it is the civil law; but if it be of any force here, it is because it was anciently received here in *England*; and this law could not be received here anciently. The books of *Justinian* were made between five or six hundred years after *Christ*, and were received for laws during forty years after their making, and practised in all the *Eastern Empire*; his *Pandecks* were in *Latin*, as the *Roman* law was, but the *Authenticks* were in *Greek*. And after *Justinian* the Second, and *Maurice* the Emperor, they were rejected for two hundred years till *Basilick* the Emperor, who laid them altogether aside, and made a new book of his own, called *the Basilick* from his own name, which were in force till the taking of *Constantinople* by *MAHOMET THE GREAT*; so that till the year 1452, they were neglected in the *Eastern Empire*. In the year 1125, they were found by *Lothaire* the Second at the siege of *Amalcarr*, and till then were not heard of in the *Western Empire*; nor was it possible they could, for it was for all that time overrun with the *Goths* and *Vandals*. And presently after they were found at *Amalcarr*, they were sent to the University of *Boulogne* to be taught. *Vide Seld.* 497. and his notes upon *Fortescue*, 11, 12. and *Dr. Duck's Use of the Civil Law*, *Lib.* 1. c. 6. So that *Henry* the First beginning his reign in *England* in the year 1100, and these laws being found in the year 1125, could not be of force in *England* in his time. But this seems grounded upon the *Jewish* law, though the said twenty-seventh of *Numbers* may seem somewhat to the contrary; but in the case there put, the father and grandfather were dead. So that since there has been such an old practice to let in the father and grandmother, preferably * to uncle or aunt; and that this is grounded upon ancient authority, which are more apparent by Books printed of late years; as *Sir Roger Twissden's Laws of Henry the First*, and the *Decem Scriptores*: it is fit there should be no diversity in this case.

Vide 3. Co. 40. b.

The Novels of *Justinian* not in force in *Henry* the First's time, not being then found.

* [626]

Et sic annuente reliqua Cur. It was ruled that no *mandamus* should go.

The

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Case 1028.

The King *against* Bishop.

On reversal of **B**ISHOP was outlawed for murder; and having brought a writ of error, he removed himself by *habeas corpus* from *Newgate*; and being asked what he had to say why execution should not be awarded against him, he prayed an allowance of his writ of error, and it was allowed; and then he prayed a *scire facias* against all the lords mediate and immediate; and because the Term was so far spent, that he could not have it returnable till the next, the Court told him, that if he got THE ATTORNEY-GENERAL to confess that he had no lands, &c. it would suffice; and he was committed to the marshal.

Dyer, 34.

1. Sid. 316. 2. Salk 495. 4. Hawk. P. C. 7th edit. ch. 50. l. 14. page 502.

Case 1029.

Crow *against* Mason.

A declaration of **D**EBT UPON A BOND. The defendant pleads in bar, as to part, that *after the last continuance* he had paid so much, which the plaintiff accepted; to which the plaintiff demurs; and it being a declaration of *Michaelmas Term*, IT WAS ADJUDGED the whole was discontinued; for the plaintiff's way had been to demur to the plea, so far as it was pleaded, as he had cause to do, it being *after the last continuance*, and no acquittance pleaded or produced; and take judgment by *nil dicit* as to the rest. PER. CUR.

2. Jones, 129. Clift, 630. Moor, 371. Hob. 81. Fort. 338.

Case 1030.

The King *against* Clerk.

In information for nuisance, by consent jury to have view.

IN INFORMATION for a public nuisance, the jury found the defendant guilty; yet because it appeared to the Court to be doubtful upon the evidence, and that the jury had not had the view, though very proper in this case, they wished the parties to consent to let this jury have the view, and to come to trial again; and it was so done by consent. And this the Court did because it was a question of right, and this trial would be peremptory to the defendant.

* [627]

Case 1031.

* The King *against* Plummer.

Several persons being met to do an unlawful act, one fires a gun and kills one of his own party, it is not murder.

S. C. 1. Kely. 109.

Keilw. 161.

Dough. 202.

Fost. C. L. 3.

Cases in C. L. 7.

INDICTMENT FOR MURDER, and a special verdict. Eight persons having a design to transport great quantities of wool, contrary to law, were with horses laden with the said wool on their way towards the sea-side. At twelve of the clock at night, the king's officers duly appointed, having notice thereof, in order to seize the wool and apprehend the said eight persons, came and way-laid them in a certain lane through which they were to pass, and hearing them coming gave the word of seizure; whereupon one of the said eight persons, having a fusée laden with powder and ball in his hand, fired it off, and killed J. S. one of his own gang, viz. one of

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of the said eight persons. The defendant was one of the said eight persons, and present at the discharging of the said fusée.

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against
PLUMMER.

The question was, Whether it be murder in him ?

And HOLT, *Chief Justice*, declared, that forasmuch as this case seemed of very great consequence, it had been for two Vacations under the consideration of all the Judges of *England*, before whom it had been several times argued at *Serjeants Inn*, in *Chancery Lane*; and that upon very great deliberation they had all unanimously resolved, that it is not murder in him. And now he openly in court declared the reasons of their resolution, to this effect :

FIRST, It is to be considered, that it does not appear anywhere in the verdict that the person who did shoot off the fusée did shoot it against any of the king's officers ; for if that had been found, it had been murder in them all ; but that being not found, we cannot intend it ; though upon the circumstances of the evidence, as it did appear, there was enough for the jury to have found such a verdict. For FIRST, they were doing an unlawful act ; SECONDLY, they were armed ; THIRDLY, it was late at night, and the fusée was discharged upon the word of seizing's being given ; and it cannot be easily thought that it was discharged upon one of their own gang, and not against the king's officers, upon this evidence, and these circumstances. But this is matter of evidence for a jury to find the fact, and not for Judges to intend it here upon a special verdict ; and therefore, though it might be a good foundation for a verdict, it cannot be so for an intendment. For in a special verdict, whereby any man is to be charged, or hurt, or convicted, though the jury find matter of evidence enough for them to find the fact, and give * verdict against him, yet if they do not find the fact, I say such matter, though pregnant evidence, yet it cannot be enough to empower the Judge to intend the fact, or condemn him as guilty of it. And so here, though there be great evidence to prove that the fusée was discharged against the king's officer ; yet because it is possible it might be by chance, or other misfortune, we must rather intend it to have been fired upon some other occasion than against the king's officer.

If it had been found he had shot at any of the king's officers, it had been murder.

Fact itself must be found, not evidence of it.

* [628]

SECONDLY, So there be two things to be considered in this case : FIRST, The fusée's not being shot off against the king's officers, but rather upon some other account, what crime is it in him that discharged it ? SECONDLY, If it be murder in him that did shoot it, it will be fit to be known what crime it will be in them who were present of his side, and how far they will be concerned in it ?

FIRST, It is plain, that he that did discharge it, and all the rest, were engaged in an unlawful act and design ; and if he, in pursuance of that, discharged the fusée, though he had not killed the person intended, but another, the offence would be in the same degree as if he had killed the person he intended to kill. *Vide Dy. 128. pl. 16.*

Nota, If a man shoots, intending to kill one man, and kills another, it is murder.

Crompt.

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Crompt. 101. pl. 474. 9. Co. 91. Now then, since we cannot take it for granted that he did discharge this fusée against any of the king's officers, or other person, what offence will this act be in him that did it? And, as it does appear, it can be no more than manslaughter in him. And here it was doubted by some, whether it might not be intended that he did it by accident.

In indictment of manslaughter, it is necessary to lay it done voluntarily; yet if the act be found, it shall be intended voluntarily, being done by man, a free agent.

But *per HOLT, Chief Justice*, That cannot be intended; for though, in an indictment of manslaughter, *it be necessary to say that it was done voluntarily*, yet it is not necessary it should be so found in a special verdict; for if it be found that he did the act, without any more, it must be understood that he did it voluntarily, as it is laid in the indictment, if the contrary do not appear; for man is a free agent, and what he does must be intended to be done voluntarily, if the contrary does not appear. And in all cases where a man is indicted of murder or manslaughter, if it appear on evidence that the fact was done by misfortune, *it must be so found specially by the jury*. And if it be not so found specially, but that he killed generally, it must be intended that he did it *with his will*. And consequently it must be intended, that this act in question was done voluntarily, and therefore, as the case is, it must be manslaughter.

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* But suppose it had been found by the jury, that the man who discharged the fusée did it of malice prepenſe, and thereby one of his gang is killed, it could not affect any of the rest, as this case is; for though they are all engaged in an unlawful act and design, and that the general notion be, that when two are engaged in an unlawful act, and that by the act of one a man is killed, it will be murder in the other; though he has done nothing, yet his being originally engaged in the unlawful act, it makes him guilty of murder. And this, it is true, is a general received opinion, but it has several qualifications and limitations.

In general, if two are engaged in an unlawful act, and a man is killed by one, the other is guilty of murder.

But to make it so, he should know of that malicious design different from that engaged in, else it is not murder.

FIRST, To make one an abettor in such a case, it is necessary he should know of the malicious design, that is, that it was unlawful; for if he be ignorant of the design, though he be engaged in the unlawful act foreign from the design, he shall not be guilty of murder: for it is possible, that if divers persons be engaged in an unlawful act, that one of them may have a particular malice against another of them, and the rest know nothing of it; and his taking the opportunity of putting that malice in execution, when he and others are engaged in an unlawful act, cannot make the rest guilty; for it would be extremely hard to make any of the rest an abettor to a collateral act, to the malice whereof they were no way privy. *Vide 14. Jac. Hale, tit. "Murder," pl. 101. Crompt. 23.*

A. has malice to B.; C. a stranger comes in by chance, and sides with A. who kills B. it is not murder in C.

A. has malice to B. and engages in a duel with him; C. a stranger comes by chance, and sides with A. and A. kills B. this is murder in A. and C. who was present abetting and assisting, is only guilty of manslaughter: Why? Because he came there of a sudden, and knew nothing of the premeditated malice: so, though it was not warrantable for him to meddle in the quarrel, yet because of his ignorance of the malice he was only guilty of the manslaughter. If

a com-

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a company of thieves go upon a design to rob a house, or to rob on the highway, and two of them quarrel, and one kills the other, and that there was no malice prepense, but a sudden quarrel, it is only manslaughter in him, and no crime at all in his companions, though they were all engaged in an unlawful act. And he quoted a case which happened on evidence at THE OLD BAILEY, in December 1664. The secretary of state made his warrant to apprehend divers suspected persons, directed to the messengers; the messengers, having notice of their being in such a house, took several soldiers with them to assist them to apprehend the said persons, but took no civil officer with them, neither did they make any demand to have the door open, as they ought by law to do, but broke * open the door; and when they had broke open the door, some of the soldiers fell a-plundering, and stole away some goods; and the question was, Whether this was felony in them all? That they were all engaged in an unlawful act is plain, for they could not justify breaking a man's house, without making demand first; and in that case, all those who were not guilty of the stealing were acquitted, notwithstanding their being originally engaged in one unlawful act of breaking the door; and the reason was, because they knew not of any such intent, but it was a chance opportunity of stealing, whereupon some of them did lay hands (a).

If thieves go to rob, and quarrel, and one of them is killed, it is not murder in the rest.

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Persons joined to break open a door without warrant, some commit robbery, it is not robbery in all, because they did not know the intent.

SECONDLY, The act of one, whereby death doth ensue, must be in pursuance of the original unlawful act. Now in the principal case, it does not appear that *J. S. was killed in pursuance of the original unlawful act*, but that another took this opportunity to kill him. Divers come to hunt in a park, and the keeper comes and commands them to stand, and would arrest one of them, and they resist, and one of them in the scuffle kills the other, it is murder in them all, because they were doing an unlawful act, and would not stand but resisted, and in pursuance of that unlawful act a man was killed. 2. Roll. Rep. 120. Palm. 30. and the *Lord Dacre's Case* (b). But if divers had come into a park to hunt, where they have no right to hunt, and immediately after two of them quarrel, and one of them kills the other, it is only manslaughter in him that kills, and no offence in the rest, because the killing was not in pursuance of the unlawful act that they were all engaged in. And it might be in this case, that he that did kill *J. S.* had a private grudge to him, and took this opportunity of putting it in execution; and there was some evidence, that the man that killed *J. S.* here did suspect him to have discovered the design, and thereupon killed him; and this perhaps the rest knew nothing of; and it would be very severe that they, who were not privy to that malice, should be guilty, if the knowledge of this malice lay hid in the breast of him who did the act. Wherever divers are concerned in a riot, or other unlawful act, and in carrying it on one is killed, though it be by chance, it will be murder in all. Dy. 128. Divers

The act of one, whereby death follows, must be in pursuance of the original unlawful act.

Vide Sav. 62.

If several go into a park to hunt where they have no right, and two quarrel, and one is killed, it is only manslaughter, because the killing was not in pursuance of the unlawful design.

Where divers are concerned in a riot, and one is killed, it will be murder in all.

(a) See *Rex v. Hodgson and Others*, Cases in Crown Law, 6.

(b) 1. Hale, 439. 443. 445. Foster's C. L. 354.

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persons came to force away goods out of a man's house, by colour of an authority of **THE LORD ADMIRAL**, and would break into the house, and a woman, who was coming out of the house, was killed by a stone flung by one of the aggressors at one of those that made opposition; and it was murder in them all by the better opinion; and we all held the law to be so: *and in the end of that case this case is put: *A.* and *C.* are fighting a duel, and *B.* comes to part them, *A.* kills *B.* it is agreed to be murder in *A.* and some held it to be so in *C.* too, though he did nothing; but the better opinion is, that it is not murder in *C.* though he was present doing an unlawful act; but he did not oppose *B.* as *A.* did, and killed *B.* because he would not let him kill another; and yet in that case *C.* had as much a murderous intent as *A.* had, though not to kill *B.*; for *A.* and *C.* had a reciprocal malice against one another.

**The unlawful
act ought to be
deliberate.**

THE THIRD QUALIFICATION to the rule is, that the unlawful act ought to be deliberate; for if it be done of a sudden, the death occasioned by pursuance of it will not amount to murder: as suppose a sudden quarrel happens between several persons, whereby the peace is broke, and a constable comes to part them, and they continue on for a time, and will not obey the constable, and the constable is killed in the fray; yet if they did not know that he was a constable, and that he came to keep the peace, so that they might take notice of the occasion of his coming, it will be but manslaughter in him that kills, and no offence in the rest. And so it was resolved at **THE OLD BAILEY**, at the sessions after *Hilary Term*, in the nineteenth year of *Charles the Second*, in one *Thomson's Case*: He and his wife fell out, and were fighting; the landlord where they lodged came to part them, and to keep the peace; *Thomson*, with great force, took him and flung him upon an iron bar that stood in the chimney, and broke his rib, whereof he died; and it was held to be but manslaughter, because, that though he was doing an unlawful act, and that the landlord, or any other, had as much authority to keep the peace as if he actually were a constable; and the killing of one who comes to command the peace, though he be

**If a person who
declares he
comes to keep
the peace be kil-
led, it is murder.**

no constable, is as much murder as to kill a constable; and that if he had declared that he was come to keep the peace, and commanded them to keep the peace, whereby they might take notice of the cause of his coming, and notwithstanding that they had killed him, it would be murder; yet this not being so, it was only manslaughter, because the original quarrel was sudden. But if it had been a deliberate riot, whether he knew him to be a constable or not, or that he came to keep the peace or not, if he kill anybody whatever that resists him, it will be murder in him, and all that join with him in the deliberate act. 2. *Ro. Rep.* 460. in an appeal of murder by *Clement* against *Blunt* the case was, *A.* and *B.* quarrel about a dog

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which *A.* had promised to *B.* but afterwards * refused to give him; upon which *B.* goes home for his sword, and comes back to the place where *A.* was, and understanding that he was gone home, he follows him home, and demands the dog, and would come into his house

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house to search for the dog, and *A.* refuses him entrance, and the other presses in, and being opposed in the scuffle kills *A.*; and it was held here at the Bar to be only manslaughter; yet *B.* was doing an unlawful act, viz. entering into a man's house against his will; and *A.* was killed in pursuance of such unlawful act; and the only reason of that resolution must be, because the unlawful act in which *B.* was concerned was a sudden one, and without deliberation. And *Hale's Pl. Cor.* 51. 57. insists very much upon it, that the unlawful act must be with deliberation, otherwise the killing cannot be murder.

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In THE FOURTH PLACE, As the unlawful act ought to be with deliberation, so it ought to do hurt to somebody, either immediately or consequentially, otherwise the killing will not be murder. *Dalt.* 218. *Br. Cor.* 171. *Stamf.* 40. *Hale*, 51. 57. that the unlawful act must be deliberate, and mediately or immediately tending to hurt somebody. A man goes to shoot a deer in another man's park, and the arrow striking against a tree glances and kills a man, it can be no more than manslaughter; though 3. *Inst.* 56, 57. be to the contrary, because it is an unlawful act.

The deliberate
act ought to be
to do hurt to
somebody.

In THE FIFTH PLACE, It is fit to be known, in relation to that rule, that it must be a deliberate unlawful act, tending, mediately or immediately, to the hurt of some person: what if it do not tend to hurt any person? yet if it be unlawful it will be manslaughter. Again, though it be not with design to hurt any person, yet if it be such an unlawful act as is felony, or carried on with a felonious intent, and in pursuance of such act a man is killed, such killing is murder, not only in him by whose hand the person falls, but also in all those concerned in the felonious intent. As if divers agree to rob a house, and some of them are placed in a passage leading to the house to watch for the rest, and the others go to rob the house, and a person happens to come by, who is stopped by those placed in the passage, and in the scuffle is killed by one of them, and no robbery is committed, yet this will be murder in all those that were by then, and likewise in all those that went to rob the house, and were not actually present. 3. *Inst.* 56. A man goes to shoot another man's hen, and chances to kill a man, it is murder, says the Book; but that must be intended that he * shot the hen with intent to steal it; and then, because a felonious intent was at bottom, it will be murder, otherwise that case cannot be law.

If it be with an
intent to do a
felonious act,
though not a-
gainst a person,
it is murder.

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So first WE ALL AGREE, That though the person that shot off this fusée did it with intent to kill *J. S.* out of a premeditated malice he had against him, yet such as did not know of such design, though present at the time, and engaged in an unlawful act with him that did discharge the fusée, cannot be guilty of murder.

SECONDLY, WE ALL AGREE, That if it were found that the fusée had been discharged in opposition to, or against any of the king's officers, and thereby the said *J. S.* is killed, it would be murder

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THE KING *against* murder in them all ; so that being not found, we cannot intend it.
PLUMMER.

Therefore the prisoner must be acquitted (a).

(a) See Mr. Justice Foster's Observations on this case, Foster's C. L. 351, 352.

Case 1032. The Parish of Godstone *against* The Parish of East Grinstead.

A respondent parish, on an order of removal being quashed, cannot remove the pauper again until he is returned.

AN ORDER OF TWO JUSTICES for the removal of a poor person was quashed at the quarter-sessions ; and before the poor person came back, the parish, whose order was quashed, made a new order to fix him in another place.

And **PER CURIAM**, It cannot be good, because a new order ought not to be made till the party were come back ; and if that order had been confirmed here, it would not make it good, because it was merely void.

Case 1033.

Anonymous.

Money brought into court.

WARD moved to bring so much money into court, to have it struck out of the declaration. Now the course is, upon bringing money into court, to pay costs so far, if the plaintiff will take it out (a) ; but if it be such an action in which the defendant may plead tender in bar of costs, and that the plaintiff, to oust him of that benefit, would reply a special *capias test.* of a Term antecedent to the principal ; all this may be opened and settled on motion. **PER CURIAM**.

(a) See Anonymous, ante, 614.

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Case 1034.

Clifton *against* Wells.

Words.

"Thou art a pockywhore," actionable.

S. C. 1. Ld.

Ray. 710.

1. Roll Ab. 43.

2. Sid. 50.

Cro. Jac. 430.

Cro. Eliz. 289.

648. 878.

Latch, 2.

1. Lev. 205.

Carth. 55.

Falm. 64.

2. Com. Dig.

"Action for

"Defamation"

(D.29). (F.21).

ACTION FOR THESE WORDS, "Thou art a pocky whore, and thou art a carrier of the pox along with you." And to maintain it these cases were urged, 1. Sid. 224. 2. Sid. 5. 2. Cro. 430. 1. Roll Ab. 67. *per totam pag.* Dalton, 150.

HOLT, Chief Justice. * No difference between these words and those others, "He has got the pox by a yellow-haired wench in Moorfields ;" and surely to say that a woman is "a pocky whore" is that she is pocky, *quatenus* she is a whore ; and to say that she carries the pox along with her makes it stronger ; and actions for words are to be encouraged, for it is a great means to preserve the peace ; and any one will understand these words to be meant of the French pox.

Judgment for the plaintiff.

Jones

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Jones *against* Sweetapple.

Cafe 1035.

ERROR of a judgment in debt upon a bond in the common pleas. Error cannot be assigned of a bond taken for appearance, that it was not said to be *per nomen vicecom.* for he might have pleaded the statute.

The error assigned was, that it was a bond for appearance taken by the plaintiff *colore officii*; and it was no where said, that the plaintiff was a sheriff, but only that he took the bond "*per nomen vicecom.*"

HOLT, *Chief Justice*. Then you should have pleaded the statute (a), and that matter; and now you are too late.

And judgment was affirmed (b).

(a) 23. *Hm.* 6. c. 10. But it is at length settled, that this is a public statute, and therefore it need not now be pleaded, Samuel v. Evans, 2. Term Rep. 569. (b) See Lavender v. Oakes, 2. Stra. 893. and Rogers v. Reeves, 1. Term Rep. 418. to 422.

2. Jones, 138.
2. Mod. 304.

The King *against* Croffe.

Cafe 1036.

A NINDICTMENT was for a *misdemeanor* for buying stolen goods, knowing them to be stolen; and a verdict for the king. A fact made felony by statute not indictable as a misdemeanor.

IT WAS MOVED *in arrest of judgment*, that the offence was a felony by a late statute made in the time of the king and queen (a), and therefore it was not punishable as a misdemeanor. S. C. 1. Ld. Ray. 711.

And PER CURIAM, Before that statute, buying of stolen goods, knowing them to be stolen, was only evidence of the party's being accessory before; but by this statute such buying is made felony (a). S. C. Trem. 136.

And judgment was arrested.

(a) 3. Will & Mary. c. 9. BUT NOTE, This statute provides only to make such as are accessories after guilty of felony. And suppose one sets another to be robbed, so that he is accessory before, yet he is not to be made a felon till conviction of the principal; and if the principal be admitted to his clergy, he shall be discharged, that is, such accessory shall. BUT NOTE, This is now remedied by an act of parliament of this queen's. See 1. Anne, c. 29. f. 2. and 5. Anne, c. 31. f. 6. NOTE to former edition. See 1. Hawk. P. C. ch. 47. p. 409. Rex v. Pollard, 8. Mod 264. Rex v. Wilkes, Cafes C. L. 98. Rex v. Baxter, 5 Term Rep. 83. 4. Hawk. P. C. ch. 29. f. 44. Foster's Cro. Law, 374.

Anonymous.

Cafe 1037.

PER CURIAM. It was agreed that the tipstaffs are the marshal's officers, and he ought to have the putting of them in; and the custody of the tipstaff is the custody of the * marshal. And it is absolutely necessary to charge the marshal in debt for escape, that he have notice of the party's being charged in execution. Tipstaffs are marshal's officers. [635] Ante, 583.

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Cafe 1038.

Anonymous.

Verdict on a void award; judgment arrested. **TO AN ACTION OF DEBT** upon an award, the defendant set forth a void award, and pleaded performance. The plaintiff joined issue upon the performance, and a verdict was given for the plaintiff; and moved this in arrest of judgment; and judgment thereupon arrested.

Cafe 1039.

Roswell against Prior.

If tenant for years erect a nuisance, for which damages are recovered, and the nuisance is continued in the lands of his lessee, an action for the continuance of it may be against either. **AN ACTION ON THE CASE** for the continuance of a nuisance by a lessee for years against the defendant, who had been also a lessee for years of the place where the nuisance stood.

Upon a special verdict THE CASE was, the defendant being possessed for years of a piece of ground adjoining to an ancient messuage, with antient lights (a), whereof the plaintiff was possessed for years, erected a house thereupon, whereby the plaintiff's said lights were stopped, for which the plaintiff brought a former action, and recovered damages; after which the defendant granted over the ground with the nuisance to another; and after the plaintiff brought this action against the defendant for the continuance of that nuisance.

S. C. ante, 215.
S. C. 6. Mod. 116.

S. C. 2. Salk.

459.
S. C. Comb.

481.

S. C. Carth. 454.

S. C. Holt, 500.

S. C. 1. Ld. Ray.

392. 713.

S. C. Lilly's

Ent. 81. 516.

1. Vent. 237.

2. Lev. 194.

1. Mod. 55.

And, Whether it lay? was the question, which was often argued: FIRST, By *NORTHEY for the plaintiff* and *BRUTHERICK for the defendant*; SECONDLY, By *DARNEL, Serjeant, for the plaintiff*, and *SIR B. SHOWERS for the defendant*; and, LASTLY, By *WILLIAMS for the plaintiff*, and *WELLS for the defendant*.

And for the plaintiff IT WAS URGED, FIRST, There can be no remedy by assize or *quod permittat* against the defendant or his assignee, because they have but an interest for years, and the plaintiff has a wrong done him, and ought to have some remedy; and that only can be by an action upon his case; and against whom shall he have it? Surely here it is material who erected the nuisance, for that is the original tort and ground of the action, for *causa causa est causa causati*; and by the erection he is become liable to the plaintiff for all the consequential damages happening to him by means of such tortious erection; and his granting it over to another is so far from excusing him, that it seems to aggravate against him, for thereby he seems to perpetuate the wrong, for he puts it out of his own power to abate it, and likewise raises himself a profit from it by inhancing his rent, and putting it by contract into the hands of another, who cannot justify to abate it without committing waste. And the erector, by this act of his, would be answerable clearly for all consequential damages, if he had not

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(a) See S. C. 6. Mod. 116.

assigned

assigned over ; and it were most unreasonable that it should be in his power to do wrong, and a continuing wrong, and have it in his power to choose persons against whom the party wronged shall have remedy, and thereby clear himself. If one is executor of his own wrong, and after take out administration, he shall not thereby so purge the wrong, so as to deprive a creditor of the liberty of charging him as executor of his own wrong ; *ergo à fortiori* here. In *Penruddock's Case (a)*, a *quod permittat* lies against the erektor of a nuisance without any request made, but not against alienee without request. 2. *Cro.* 373. in point, that an action lies against the lessor for a nuisance continued by his lessee, it being erected by him. *Vide* 3. *Cro.* 191. He that is hurt by a nuisance, though long after the doing the act that occasions it, shall have his action against him that does such act. 2. *Ro. Abr.* 137. 2. *Leo.* 153. 3. *Leo.* 174. The plaintiff's remedy is of necessity against the defendant or his assignee ; it will not lie against the assignee without notice and request, and that must be personal ; and that will still be more absurd to favour a wrong-doer, so far as to discharge himself of a remedy against him for a wrong, by putting a farther difficulty upon him to whom he has done the wrong. Besides, it is doubtful whether the action would lie against the under-lessee ; and if it does not, surely it will lie against the lessor ; for it will not be said, that by the grant over the plaintiff shall be deprived of all remedy. *Vide* 3. *Cro.* 520. that the action would not lie against the assignee of land whereon there is a nuisance. 1. *Ro. Rep.* 320. And as to that the diversity was remembered, when the continuance occasions a new nuisance, as in case of a pent-house, where every new dropping of the rain is a new nuisance, and where the nuisance at first dath has done all the mischief it can ; in the first case action will lie against the assignee, but not in the other. 2. *Cro.* 373. 555. And the case in 11. *Co.* 51. was strongly urged : Disseisor makes a feoffment over, disseisee re-enters, he shall recover damages for the mean profits against the disseisor, though the feoffee took them ; and so is *Hob.* 98. ; and that was said to be a stronger case than the principal case now in question.

Of the other side IT WAS SAID, that this action either lay against assignee alone, or at least it ought to be brought against him * and the assignor jointly ; for it being for the continuance only, and that after assignment over ; and to make the assignor answer damages in such case were to charge him for a nuisance in a place which is not his : and as the assignee has the sole advantage of the continuing, so he ought to be charged with the disadvantages likewise ; and for this were quoted 2. *Cro.* 555. *F. N. B.* 124. *H. I.*

Before the statute of *Westminster the Second*, c. 24. affize of nuisance lay not against erektor of a nuisance after granting over the freehold ; and the only remedy was by *quod permittat*, and that lay only against the alienee. 2. *Inst.* 405. And the alienee alone ought to answer for damages in an action on the case, as he should

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against
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3. *Co. Walker's*
Case.

A *quod permittat*
lies against the
erektor of a nu-
sance without
request, but as
against alienee
request is neces-
sary.

1. *Vent.* 48.
1. *Mod.* 27.

Nuisance conti-
nuing nuisance,
or all at once,
different.

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Before *Wyl.* 2.
24. affize of nu-
sance lay not a-
gainst erektor of
nuisance after as-
signment.

(a) 5. *Co.* 101. a.

T t 3

in

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against
PRISON.

in a *quod permittat*, or at least it ought to be brought against them both; as if two coparceners commit a nuisance, and one of them dies, the assize or *quod permittat* must be brought against the surviving aunt, and the heir of the other. 2. *Inst.* 406.

The reason of a remedy for a nuisance is because of the maxim, *sic utere tuo ut alteri non noceas*; and here the thing which occasions the wrong is not the defendant's; all that the defendant did was to erect, and for that damages have already been recovered against him, and since he has done no nuisance; for the erection cannot be said a continuance, no more than the continuance to-day can be a continuance to-morrow.

This were to punish one for what he cannot redress; for he cannot justify the abating this nuisance. And this case was put by them: If a man does falsely imprison another, and afterwards the imprisonment is continued at other people's contrivance, the first wrongdoer shall not answer for that in damages, *cujus contrarium verum est*, if he were not discharged of the first imprisonment.

He ought to answer damages for the continuance who ought to abate it; and at common law the alienee in case of freehold ought to abate, for the *quod permittat* lies against him alone; *ergo* he alone ought to answer damages upon an action upon the case; and the same reason holds in case of lease for years. The continuance is the wrong complained of, and the sole foundation of the action; and the only material question is, By whom it is continued? And surely that must be the occupier. And damages ought to be recovered against him for whose benefit it stands, and that is the occupier. And as the writ of a demandant is altered by an alienation, so may his remedy for damages. If one throw a log over a private way * which A. has over his land, and afterwards alien, will an action lie against him for the continuance of this log athwart the way in the hand of the alienee? Or if a man build a cottage, without allotting so many acres of ground to it, and then grants it over, will action lie for the continuance of it?

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Erecting and continuance are several offences, and every day's continuance of the nuisance is a new nuisance; for it is the possession and usage of this nuisance, to the damage of another, is the cause of the action, and that is done by the assignee. And if the defendant be answerable for this nuisance, by the same reason his heir would, if this were a lease out of the inheritance; for he might abate it as well as the defendant, and he would be advantaged by it, by increase of the rent.

There is a diversity between an act that is in itself a direct wrong to another, and an act in itself lawful, but consequentially injurious to another. The case of disseisin before put is of the first sort, and therefore the disseisor, by making a feoffment over, is not quit of answering the mean profits; for otherwise the disseisee would be without remedy, for he has none against the feoffee, who is in by title,

title, and has done no wrong to him. But the doing the thing on one's own soil is primarily and directly no wrong to another, but may be so consequentially by the effects of it; and for this *vide* 1. *Roll. Rep.* 393. One set up poles in his own ground in order to build a house, which when erected would be a nuisance to another, he cannot abate them to prevent the nuisance; and if a trespasser builds a nuisance upon my soil, and I never use it, *quare* whether the other has any other remedy than by abating it. And here the plaintiff has his remedy against the assignee for the continuance, so there is no necessity to give him one against the assignor; and the necessity is the reason of the case of the disseisin so much insisted on.

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It is true, one shall not transfer his wrong over to another, so as to discharge himself; and that is also a reason of the case of disseisin before put. But here the erecting the house is not in itself a tortious act, but becomes so only *ab effectu*. And here is a recovery against the defendant already for the tort arising from the erecting, and thereby the erecting is altogether become lawful; for the recovery is a recompence for the wrong, and gives the wrong-doer a right to that which before was wrongful: as if *A.* takes away the horse of *B.* for which he recovers * damages, the property of the horse is thereby vested in *A.* And if in this case the assignee had assigned over, Would an action lie against him for the continuance after? If it would not, there is no reason it should in this case, for the original tort is here purged by the recovery.

* [639]

PER CURIAM. A *quod permittat* must be brought against the alienee, because in its nature it must be brought against him that is tenant to the freehold. An assize of nuisance must be against the alienor and alienee; but if the alienee dies, the party must have a writ of entry in the *per*, and not an assize. And surely this action is well brought against the erector, for before his assignment over he was liable for all consequential damages; and it shall not be in his power to discharge himself by granting it over; and more especially here, where he grants over, reserving rent, whereby he agrees with the grantee that the nuisance should continue, and has a recompence, *viz.* the rent, for the same; for surely when one erects a nuisance, and grants it over in that manner, he is a continuor with a witness. And suppose in this case the lessor or assignor had been seised in fee, and had erected this nuisance, and then infeoffed another over, he had conveyed this as a nuisance, and *causa causæ est causa causati*. And if a wrong-doer conveys his wrong over to another, whereby he puts it out of his power to redress it, he ought to answer for it. And whereas it is objected, that the tort of erecting is purged by the recovery for the erecting, that is not so, for then the erector might lawfully continue the nuisance; but if the nuisance continue after recovery for the erection, such continuance will be such a nuisance as a new action will lie for: and the putting it out of one's power to abate a nuisance is as great a tort as not to abate it when it is in your power to do it. And it is a fundamental principle in law and

A *quod permittat* can only be brought against the alienee, as being tenant of the freehold.

Action may be brought against the erector, he thereby being liable for all consequential damages, which he cannot purge by assignment over.

Action will lie for continuance of a nuisance.

Vide 2. Com. 334.

Hilary Term, 13. Will. 3. In B. R.

He who does the first wrong shall answer for all consequential damages.

reason, that he that does the first wrong shall answer for all consequential damages; and here the original erection does influence the continuance, and it remains a continuance from the very erection, and by the erection, till it be abated. And the case of the disseisor and disseisee is full in the point; for what makes the disseisor liable for damages when the lands were in the hands of his feoffee but the original tort? And in case of disseisin, trespass does not lie for the profits till re-entry; and by the re-entry, though it be upon the fourth or fifth feoffee, the disseisin is purged, and whoever continues in after is a new trespasser; and for continuing in after such entry, damages shall be recovered against the * feoffee; for the disseisin by his re-entry was purged, and the title by which the feoffee was in is defeated, and the feoffee continuing in after is a trespasser, or disseisor, as the disseisee pleases. And the distinction, that the building is not merely a nuisance, is very metaphysical. It is true, if you abstract the building from the hurt that it occasions to the neighbour, it is no nuisance; but surely the building a house, which is a nuisance, is a *malum in se*, for one must use his own so as not to hurt another; and these lights being antient, the plaintiff has as much right to them as the defendant has to the land; and his user of the land is restrained by the interest the plaintiff has in his lights.

* [640]

NOTE: It was farther said by THE COURT, that if one takes another prisoner by wrong, and then turns him over to another officer, who detains him, the first taker shall answer for all the consequential damages. But if this action here were brought by an alienee of the land, to which the nuisance was, against the erector, and erection had been before any estate in the alienee, the question would be greater, because the erector never did any wrong to the alienee. But here they agreed to give judgment for the plaintiff.

NOTE: HOLT, *Chief Justice*, said, in the debate of this case, that he was not satisfied with the case of *Rippon v. Bawls* (a).

Whether it be waste in alienee to abate a nuisance.

FIRST, That it would be waste in the lessee to abate the nuisance.

Though action lies against either, shall be but one satisfaction.

SECONDLY, In case it were, that therefore an action would not lie against him for the continuance of it; for it was the lessee's fault to contract for an interest in land on which there is a nuisance. But the action lying against the lessee is no reason why it should not lie against the lessor, for the party shall have but one satisfaction; for, the plaintiff having his election against which of them to bring it, by commencing it against one has determined his election: as if one may bring trover against two jointly or severally, and he brings it against one, and has damages once ascertained, he is for ever barred against the other; and so it is in battery.

(a) Cro. Jac. 373.

Finch *against* Harris.

Cafe 1040.

PROHIBITION was moved for to stay a suit in the spiritual court, against a clerk in orders, for preaching without a licence, upon suggestion, that there is a chapel donative within such a parish, four miles distant from the * mother-church, and that it is consecrated; and that this suit below is for preaching there; so the ordinary has nothing to do with it; and the design of this libel is to bring in question whether this be a donative or a chapel of ease.

Though donative be exempt from the ordinary's jurisdiction, the clerk of it is not, who may be punished by ecclesiastical censures, but not to deprivation.

But **PER CURIAM**, None can preach without licence of the ordinary (a), whose cure it is to prevent heresies and schisms in his diocese; and there is a canon against preaching without licence, and that binds all the clergy. And a clerk ordained cannot preach even in the diocese whereof he is, and by whose diocesan he is ordained, without licence; though one would think the very ordination would amount to a licence to preach within that diocese. And though it be true, that the ordinary cannot punish him by deprivation of this benefice (b), it being a donative, yet he may censure him otherwise; for otherwise the inconvenience would be intolerable, that it should be in the power of a man, by putting in a clerk into such donative, to exempt him from the censures of the ordinary and subordination to the ecclesiastical law (c).

Ante, 420. 428.

None can preach without licence.

And *per Holt, Chief Justice*, It is against the law ecclesiastical to preach in a place not consecrated; and it would be to set up a conventicle. Indeed one may pray in his own house for his family, but he cannot preach there; and this clerk, without question, is visitable by the ordinary, though he has no jurisdiction over the thing, so as to deprive, as in case of a rectory.

And here they at last moved for a prohibition *quoad* the reading prayers;

But it was denied.

(a) But see *Allane v. Exton*, 1. Mod. 90. *Powell v. Milbourne*, 3. Will. 361. *Campbell v. Aldrich*, 2. Will. 79. See also 1. Term Rep. 403.

(b) *Ladd v. Widdowes*, 2. Salk. 541.

(c) See 2. Burr. E. L. "Donative," page 195. Co. Litt. 344. *Colefax v. Newcomb*, 2. Ld. Ray. 1205. *Castle v. Richardson*, Stra. 715.

Anonymous.

Cafe 1041.

PER CURIAM. One committed to marshal by the Court, may be brought up by rule of Court; but one committed by a Judge in his chamber cannot be brought up without a *habeas corpus*, to which a return may be made.

One committed by Judge in his chambers must be brought up by *habeas corpus*.

Stretch-

Hilary Term, 13. Will. 3. In B. R.

Case 1044.

Stretchpoint against Savage.

A declaration for using a trade from 23. Feb. to 23. Jan. following, viz. per duodecim menses integros, is bad, but may be cured by verdict.

Vide 1. Year. 111.

* [642]

DEBT upon the statute of 5. Eliz. c. 4. f. 31. for using the trade of making "*chartas pictas*," ANGLICE playing cards, from the twenty-third of February until the twenty-third of January following, viz. *per duodecim menses integros*, not having served his time for seven years.

After verdict IT WAS MOVED in arrest of judgment, that the computation here is by *calendar months*, whereas by the statute it must be by *lunar months*; and for this was quoted the case of *King v. Stowbridge (a)*. And if this should be construed, that if he used it for the time mentioned here, he must have used it for eleven *lunar months* of necessity, then it will be incertain when they will begin the computation; and the defendant may be again charged for part of the time for which this recovery now is, and cannot plead this recovery in bar; and the right way had been to say, that from such a day *per undecim menses prox. sequent.* be used it.

An action for making *chartas pictas*, ANGLICE playing cards, good.

THE SECOND EXCEPTION was, that "*charta picta*" were painted cards, and not playing cards, for the Latin for playing cards is "*charta lusoria*."

BUT PER CURIAM, The Romans had not playing cards, and *charta lusoria* may as well be a kite as any thing else;—but the other would be fatal, but is helped by the verdict's finding him guilty of two months *lunar* next after the twenty-third of February. And if a man use a trade fourteen days in one month, and then ceases, and uses again fourteen days in the next month, he is not punishable by the statute.

(a) Michaelmas Term, 6 Will. 3.

Case 1043.

Colt against Swift.

Conviction of manslaughter, is a good bar to an appeal if the indictment was good, and the plea is well pleaded.

IN an appeal of murder by Colt against Swift for the death of his brother, a conviction of manslaughter, and clergy allowed, was pleaded in bar, and allowed to be good.

BUT IT WAS ALSO AGREED, that if the indictment, on which the conviction was, were vicious, or if this plea were ill pleaded, the defendant must plead to issue.

Description of the wound in an indictment of murder is only to shew it was mortal.

And therefore IT WAS EXCEPTED to the indictment, that the latitude of the wound was not set forth. Vide 4. Co. 40. & 41.

Et

Hilary Term, 13. Will. 3. In B. R.

But *non allocatur*; for the depth of the wound and the place where it was were ascertained; and the reason why such curiousness is requisite is, that it may appear to be the same in identity, and that it was mortal; and both these ends are answered by the description of the wound, as it is in the indictment.

Costs
against
Swiss.

ANOTHER EXCEPTION was, that the indictment set forth, that two others were present and abetting, but did not say in what county they were.

A principal in murder cannot take advantage of a defect of venue as to aiders and abettors.

Sed non allocatur; for however that might be as to the abettors, yet it could not be an exception for him, who was charged as principal, for it was laid where he was.

And here, *per* HOLT, Chief Justice,

FIRST, The benefit of the clergy, and *burning in the hand*, is no judgment. Benefit of clergy.

SECONDLY, If a man be convicted of manslaughter, and no judgment of death given, *Auterfoits convict* will not be a good bar of an appeal, but conviction and benefit of clergy is. Judgment must be given to warrant *auterfoits convict*.

THIRDLY, If one be convicted of manslaughter upon an appeal, the king may pardon the burning in the hand, which shews it is * no judgment, for then could not the king pardon it: and the statute of *Henry the Seventh* has taken away the judgment of delivering over to the clergy, but orders a mark to be put on the party. The burning in the hand on a conviction of manslaughter may be pardoned.

* [643]

Crosse against Smith.

Case 1044.

ERROR of a judgment in the court of *Ely*, in an action for words. The error assigned was, that after the plaint levied, and before issue tried, a *certiorari* issued out of the court of common pleas to remove the proceedings into that court, which writ was duly served upon the judge, before the jury sworn, and allowed by him; that notwithstanding he proceeded to try the cause, and so gave judgment, which was void, as being *coram non judice*. A *certiorari* lies from the court of common pleas to remove an action from the court in the Isle of *Ely*; and if the writ be duly served on the judge below, and he afterwards proceeds to try the cause, the proceedings are erroneous; for the charter, giving this court the consuance of pleas, does not oust the common-law courts of their ordinary jurisdiction.

To this the defendant pleaded the charters of creation of the franchise of consuance of pleas to the predecessors of the bishop of *Ely*, and an allowance thereof in the courts of *Westminster Hall*:

And on demurrer the case was argued several times at the Bar.

And now HOLT, Chief Justice, delivered the judgment of the Court. Surely if the *certiorari* be well penned, it is a *superfedeas* of all proceedings below; and the Counsel cannot be in earnest, when they pretend to make the franchise of *Ely* in equal degree with that of a county palatine. And admit the charter had been to hold that by this all the king's subjects should lose the benefit of the Term, *Taylor v. Reignolds*. S. C. 1. Salk. 248. S. C. 3. Salk. 79. S. C. 7. Mod. 138. S. C. 2. Ld. Ray. 336.

king's

Crown
grant
Smith.

king's courts, which are part of the constitution of the government, and part of every man's birth-right to sue and be sued in? And it would be very inconvenient if it were so; for suppose a man go to market within this jurisdiction, there he is arrested, and if he has not bail living within their jurisdiction, he must go to gaol; for bail out of the jurisdiction will not do, because their process cannot reach such bail; and besides, he shall have his cause tried by strangers to him, and acquaintance of the plaintiff's living within the jurisdiction: and surely it never was in the power of the Crown to deprive the subjects of their birth-right, as to make such a grant binding upon them.

• [644]

7. Vent. 156.

SECONDLY, The grant is, that the bishop should have consueance of pleas: What is that? That one living within that jurisdiction should implead another in the bishop's court, for a cause of action arising within that jurisdiction; and who is to claim this, if the action should be commenced above? Not the defendant, for he cannot plead * it to the jurisdiction of the superior court; but the course is for the lord of the franchise, by himself, his bailiff or attorney, to come into the superior court, and produce his charter of consueance; or if it be very antient, to shew an allowance of it in that court, and pray consueance. And upon allowance of his claim, the court above appoints him a day to hold this court on, and directs the parties to go down on that day; and if justice be not done below, the record remaineth here above; and the Court has a constant superintendancy over the cause. So that if justice be not done below, as if the defendant live without the franchise, and has nothing within the franchise by which he may be summoned, or if the judge does not do right, the plaintiff may come up and shew this matter to the Court, and thereupon a re-surremons shall go upon the record here, and the Court shall proceed to do justice here; so that though consueance be allowed according to the grant, yet the matter shall be brought back hither, if right be not done below; and all this was for the benefit of the lord of the franchise; and even this was hard enough upon the subject. And there was great reason for this course in former days, when great men did abet and maintain parties, and these great franchises generally obtained by abbots and churchmen, who then had three parts of the lands of the kingdom in their possession; and they received legitimacy more from length of time than from any reason that there was for them. And so is the statute of 27. Hen. 8. c. 24. concerning resumption of liberties, that all these jurisdictions are detrimental to the king and his prerogative; and for that reason their power of pardoning in county palatines, and making of justices, is taken away. And there have been always *certiorari's* to correct abuses in these jurisdictions. Exempt jurisdiction is this, and was granted to cities or towns corporate for the benefit of trade; it was a grant to the freemen of such a city or town, that they should not be impleaded out of their city or town, and this grant was good, if there were a court in the city or town to hold plea of the matter.

Exempt jurisdiction is, that shall not be impleaded out of jurisdiction, which he may insist on, or waive.

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matter. And if such inhabitant, in that case, be impleaded in any other court, he shall plead this franchise to the jurisdiction; and if he were sued below, he might have a *certiorari* and remove it up; for the privilege of being sued no where else being for his advantage, he may waive it: so there is no court can stand against a *certiorari*. In *London* they have a way of proceeding by *foreign attachment*; yet it is every day's practice to remove * the cause up hither by *certiorari*, and thereby all the proceedings below upon the attachment are dissolved. A third sort of franchise is *tenere placita*, that is power to hold plea of matters within such a precinct, but does not exclude any other jurisdiction, nor intitle the lord to claim conuance. 9. *Hen. 6. pl. 59.* Cases are removable out of inferior base courts, by *recordare* or *pone*, as the case shall require; but to remove out of a court of record, it must be by *certiorari*. And to say such a writ is not found in the Register, *ergo* it does not lie, is no argument, for half the writs used in WESTMINSTER-HALL are not in the Register. The statute of 43. *Eliz.* means *certiorari*'s by the words "other writs," and it is remarkable, that the thing complained of there is, not that the writs were used, when in truth they did not lie, but that an abuse was made of them, *viz.* that they were brought after trial; and therefore it provides that no *certiorari* or *habeas corpus* shall be sworn or allowed, unless it be delivered before the jury sworn. And again, the statute of 21. *Jac. 1. c. 23.* takes notice of *certiorari*, and only complains of the oppressive manner of using them, *viz.* after party had proceeded a considerable way below, and likewise removing causes of small value; and therefore the courts below are allowed to detain causes under five pounds; and likewise where the *certiorari* or *habeas corpus* is not delivered before issue joined, so that it be not joined within six weeks after, &c. both which statutes shew this writ was lawful, but abused, and the abuses are only cured; and if the writ were not legal, the parliament would have condemned it, as well as the abuse of it. And the king's courts are for his subjects and people, as well as for himself; and as when it is granted to a corporation to hold a session of the peace within their borough, before such and such justices, that are freemen of the town, though such a grant is a franchise to them, and it is as much their right to hold sessions and take conuance of matters proper for their jurisdiction, as it is the *Bishop of Ely*'s right in this case; yet by daily practice *certiorari*'s go to them to remove indictments from before them to this court; so by the same reason it will lie here; and it is more just and honourable for the subject to receive justice in the king's immediate courts, and from Judges appointed by himself, than from Judges named by his fellow subject; and there is as much difference between the king's * courts and those that are held by franchises, as there is between the people he governs by himself, and those he governs by his vice-roys in his plantations. And he quoted a case in 2. *Roll. Abr. 493. Jonson v. Ellis*: An action was brought in the court of *Maidstone*, and an *habeas corpus* brought and served in

Crossed
against
SMITH.

* [645]

Franchise to hold plea of matter within such a precinct, does not exclude any other jurisdiction.

Cases are removed out of base courts by *recordare* or *pone*, but out of courts of record by *certiorari*.

* [646]

due

Hilary Term, 13. Will. 3. In B. R.

**CHURCH
against
SMITH.**

due time, and notwithstanding judgment given below; and this judgment was for this error reversed. So here if the *certiorari* be good in the form and frame of it, that is, if it describe the record right, without doubt the judgment is erroneous.

It is better to
bring *habeas cor-
pus* than *certio-
rari*.

If by the course
below special
bail be required,
special bail must
be above, else
procedendo shall
go.

And HOLT, *Chief Justice*, said, he wondered the people did not bring a *habeas corpus* and not a *certiorari*; for the defendant may well say, I will not be sued in this inferior court, but will be sued above, and there I will put you in such bail as the Court above will reach, though your process cannot come at them, and that I cannot give you such bail as you can reach: and so he may well remove the cause by *habeas corpus*. And in such case, if he do not put in such bail above as the action would require below, a *procedendo* should be granted; for if by the course below there ought to be special bail, though common bail would do if it had commenced above originally, yet special bail must be given above, or a *procedendo* shall go. And if one action require special bail, and another not, and that do not appear to be done fraudulently to hold to special bail, there we will hold it to special bail, or grant a *procedendo*; but if fraud appear, we will retain it. And though the principal case be between two persons dwelling within the *libty* of Ely, yet that makes no difference. And he said he had known inferior courts held to harder play than this, for he had known in the common pleas, that in escape out of execution upon a judgment in an inferior court, the officer was let in to alledge that the original cause of action was not within their jurisdiction, though it were laid to have been within it, admitted by the party so to be: But I think that hard, because it is a court having jurisdiction; and since they have shewed the matter within that jurisdiction, and that has been admitted on record. I hold the party himself would be after concluded to say that it was not within, and by consequence the officer is so too. And it has been held that false imprisonment would lie against an officer for the arrest, if the cause had not arisen within their jurisdiction, though it had been alledged by the plaintiff to have arisen within it, and so confessed by the defendant, but that was hard. But the best way is to make right use of their jurisdiction, and not to pretend to hinder the subject of his right of using the king's courts: And property is much larger now than formerly; for then there were many villains, but now we are all freemen.

• [647]

So PER CURIAM, It is apparent error.

But then an exception was taken to the writ of *certiorari*.

Case 1045.

Thomson *against* Southwell.

The Court will
take notice what
day of the month
Term begins.

DECLARATION was generally of *Easter Term*; and cause of action laid in such a day in *April*, which day in fact was within the Term.

FIRST,

Hilary Term, 13. Will. 3. In B. R.

FIRST, It was agreed that the Court would judicially take notice of the first day of that Term, viz. what day of the month it was, and consequently that the cause of action accrued after it (a).

Declaration of such a Term refers to the first day, if there be no special memorandum.
1. Sid. 373. 432.
2. Lev. 176.
Carth. 114.
T. Jones, 87.
Cowp. 456.

SECONDLY, That a declaration generally of such a Term, without any *special memorandum*, refers to the first day of Term; otherwise if there were a *special memorandum* of the time of filing the bill, or of giving bail; so if it be made out in fact to have been at a day after the day of cause of action mentioned, it may be set right (b).

But upon examination, it appeared the declaration was accepted by consent;

Which HOLT, *Chief Justice*, said, was a filing of common bail of course, but there was no writ or process returnable; and thereupon

HOLT, *Chief Justice*, declared, if there were a process returnable at a day certain, and it had appeared when bail had been put in, that would be a ground for amendment; but it being only found that common bail was filed, that must refer to the first day of Term.

And the judgment was arrested (c). *Vide 2. Lev. 12, 13. 176. 3. Keb. 112. 124. 693. 1. Vent. 135. Hob. 70.*

(a) 1. Sid. 304. 308. Cro. Jac. 548. Cro. Eliz. 210. Cro. Car. 53.

(b) 2. Stra. 1271. 1. Will. 171. 1. Black. Rep. 312. 3. Burr. Rep. 1241. Tidd's Pract. 191. B. R. H. 141.

(c) The party may now file a new bill, and amend by that, *Russell v. Martin*, 1. Stra. 583. and the Court will not permit the time of filing it to be enquired into, *Wilder v. Handy*, 2. Stra. 1151. *Marshall v. Riggs*, 2. Stra. 1162.

The King against Cranmer.

Case 1046.

AN INDICTMENT was for perjury; the defendant entered into a recognizance to try it, and was desirous to carry it down to try, but the prosecutor entered a *non prof.*

Non prof. entered by prosecutor, set aside.

PER CURIAM. It was an ancient but illegal practice, that if an indictment had lay still for a long time, to enter a *non prof.* upon it. But that ought not to be without leave of THE ATTORNEY GENERAL, not even at the request of the prosecutor; for it would be of intolerable mischief, that it should be at the discretion of the prosecutor to make an end of the king's suit, and also to get a bill for an infamous * crime found of record against one, and by such entry of *non prof.* deprive him of the means of clearing himself by trial.

S. C. 1. Ld. Ray. 721.

* [648]

And for these reasons THE COURT did set it aside; and if the indictment be vitious, an acquittal in it will be no bar to a new one.

Anonymous.

Hilary Term, 13. Will. 3. In B. R.

Cafe 1047.

Anonymous.

Perme not changed in covenant. **V**ENUE is never changed in covenant.
Say. Rep. 146. 2. Term Rep. 781. Tidd's Pract. 358.

Cafe 1048.

Anonymous.

Riot may be by **P**ER CURIAM. If one go to assert his right with force and violence, he may be guilty of a riot.

Cafe 1049.

Anonymous.

Common. **A** has right of common in such a close, which belongs to B. who, after the corn taken away sows peas in it; he cannot by such a trick deprive A. of the benefit of his common.

Cafe 1050.

Courtney against Hornigold.

On claiming *oyer* of an award, if it contain more matter than the plaintiff has set out, he cannot recover. **D**EBT UPON A BOND for performance of an award; "nul a ward" pleaded; the replication sets forth an award of such and such things of one side, and such things to be performed of the other side, all well awarded; assigns breach; and brings the award into court; the defendant prays *oyer* thereof, and has it; whereby it appeared that it did contain more matter than the plaintiff did shew in his replication; and demurs for the variance.

Ante, 533.

AND IT WAS URGED, that if issue had been taken upon the replication, and the award, whereof *oyer* was given, had been produced in evidence, the plaintiff must have been nonsuited, for they were quite different awards. And the award is intire, and ought to be altogether set out, for there may be that in the award, which if set out might make it all void, or at least shew that the plaintiff had no cause of action: for suppose here they had concluded by declaring that they had made no award, or had awarded that the plaintiff should deliver to the defendant twenty pounds and a horse, and that thereupon the defendant should deliver a certain deed to the plaintiff; can it be said, if the plaintiff had brought debt upon a bond for the performance of that award, and upon "nul award" pleaded should reply, and set forth an award that the plaintiff was to deliver the defendant a horse, whereupon the defendant should give him up the deed, that upon issue thereupon the award made would maintain the issue? Besides, the submission is with an "ita quod de premissis," and the award set out in the replication is not so. It was agreed, that perhaps in debt upon the award this way would do; but this being a collateral thing, viz. a bond with a penalty, it will not do.

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To WHICH it was answered, That true it is, if the defendant had come to excuse himself of the forfeiture of his bond, he ought to set out the whole award; but when one is only to shew cause of

Hilary Term, 13. Will. 3. In B. R.

of action, it will suffice to shew enough that a cause of action may appear to the Court; *vide Woodman and Mantle's Case in Plowd. and Hammond and ——— Case in Brownl.* If a man be bound to B. to pay him such a sum, provided he makes a feoffment upon condition to C. in an action brought upon this bond, the defendant shall not crave *oyer* of the deed of feoffment, and alledge that it is not according to the condition of the bond.

COURTNEY
against
HARRISOLD.

HOLT, *Chief Justice*. The award must be reciprocal, or else it is not good; and you have omitted part of what is to be done of one side, and therefore a part of the award to be done of your side, which was traversable by the defendant; and if it would be against you on verdict, it will be so too on demurrer upon *oyer*. And though your declaration upon the bond, and the breach alledged be well, yet if that which you shew upon *oyer* does not maintain it, you are gone. where it is necessary to set out a collateral matter to make the declaration good. And he advised them to discontinue, and pay costs, and so they did.

Stamford against Sims.

Case 1051.

IN replevin, the defendant avowed the taking in *quodam messuagio vocat. The D.* in such a parish.

Pleading in replevin.

NOTE, The replevin was for goods taken in *quodam messuagio vocat. B.* and the avowry, that *prædictum messuag. in quo* the taking was, was called *D. absque hoc*, that the taking was in *B.*; and upon demurrer,

1. Leon. 44.
Cro. Jac. 372.
Cro. Eliz. 504.
3. Will. 295.

Judgment was given for the plaintiff *PER CURIAM*; for the way had been to say, that the *locus in quo* the taking was, was called *D. ABQUE HOC*, that it was in the said messuage *vocat. B.* and *pro retorno habendo* to make title to the distress. *Vide 2. Lev. 92. 1. Vent. 127. ant. 67.*

* [650]

* Smith against Oxbring.

Case 1052.

DEBT upon a recognizance bail. HOLT, *Chief Justice*. This is much practised of late to oust the bail of the benefit of rendering the principal, as he may do on a *seire facias*; and since there is reason the bail should have equal indulgence in both cases, let THE RULE be, that the bail have *eight days* in full Term after return of process against the principal to render him. So if for the purpose process be returned only within *four days* of the end of the Term, the bail shall have *four days* in the next Term to render, and upon their bringing in the principal in the mean time they shall be discharged; and till that time be past, the Court will grant an imparlance.

Bail shall have eight days in full Term, after return of process against the principal, to render.
1. Ld. Ray. 83.
2. Salk. 202.
1. Ld. Ray. 722.
6. Mod. 232.
1. id. 2. Præst. 246.
2. Stra. 915.
Impey's Præst. Rep. 363.

4. edit. 409. Barnes, 62. 2. Cramp Præst. 70. 3. Term Rep. 363.

Case 1053.

Jackson *against* Bridge.

Covenant by executor against a person on a covenant to serve testator or his assigns, averring that he used the same trade.

DEFENDANT did covenant to serve the plaintiff's testator and his assigns for eight years.

The question was, Whether the plaintiff as executor was an assignee in law? for by the agreement it is not fixed to the person of the testator; for if it were, the executor should have it, and it would be assets in his hands, *vide Plowd. 287. b. 288. a.*

3. H. Bl. Rep. 333.

And it was said, that if the executor did set up such a trade as the servant was to be employed in by the covenant, it ought not to determine by death of the covenantee. *Secus* it were hard to transfer the servant to another service, and so it was said it would be in case of an apprentice (*a*).

And here it being averred that the plaintiff used the same trade in which the defendant had covenanted to serve, he had judgment.

(*a*) See as to apprentices, Wadsworth v. Executors of Grey, 1. Keb. 820. Salk 66. Caistor v. Eccles, 1. Ld. Ray. 683. Salk. 68. 1. Willf. 96. Baxter v. Binfield, 1. Conft's P. L. 523. Rex 329. Rex v. Pet, 1. Shower, 405. v. Eakring, Burr. S. C. 320.

Case 1054.

Gibbs *against* Walkley.

Double error in fact assigned is ill. But if there be error apparent in the record, shall be reversed.

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A DOUBLE ERROR in fact was assigned. And *per* HOLT. Chief Justice, The way is to plead *in nullo est erratum*, and shew the duplicity for cause to affirm the judgment, *vide 1. Roll. Abr. 763.* But if apparent error appear on the record, notwithstanding the ill assigning of the error in fact by reason of the duplicity; yet judgment ought to be reversed for * such apparent error.

But here no such error appearing on the record, the judgment was affirmed, because of the duplicity of the error in fact. *PER CURIAM.*

Case 1055.

Lane *against* Green.

A declaration in debt on bond in 1689 good, though the bond was dated in 1659.

DECLARATION, That the defendant the eighth of September 1689, *per scriptum suum obligatorium concessit se teneri* &c. to the plaintiff; and, upon oyer, the bond bore date the eighth of September 1699, and for the variance a demurrer.

It was urged, that since the plaintiff varied the lien from the date of the bond, he ought to shew when it was first delivered; and the right way had been to declare upon the bond with the date it bore, and then to say *primo deliberat.* at such a time; and at this rate one might declare upon a bond after the action brought.

But

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But PER CURIAM, Since it is said that such a day *concessit se teneri*, it is well, for that could not be without it were then delivered; it is well enough.

LANE
against
CASE.

Judgment was given for the plaintiff.

Gree against Rolle.

Case 1056.

EJECTMENT against two, who enter into the common rule of confessing *lease, entry and ouster*. At the trial before a Judge of *nisi prius*, one of them refuses to confess lease, entry and ouster, and the plaintiff enters a *retraxit* against him, which the Judge of *nisi prius* records, and goes on to trial against the other, and verdict for the plaintiff.

In ejectment a *retraxit* was entered as to one at *nisi prius*. and trial against the others, and held well

And IT WAS MOVED in arrest of judgment, FIRST, That a Judge of *nisi prius* cannot record a *retraxit*, for before the statute of York (a) he could not record a nonsuit, and a nonsuit against one would make an end against both; and yet a *retraxit*, as here contended for, would not make an end as to both, but would sever the pleas of the parties against their own consent. It is true, if they had severed in pleading; a *retraxit* against one would not discharge the suit against them both, for there the one defendant is not concerned with the other. 1. Sid. 76. Covenant against two to build a house artificially, and one of them lets judgment go against him by default; the other pleads that he did build the house artificially, and a verdict for him; and held, he that suffered judgment by default should be discharged too, for now it appears there was not such cause * of action against both, as the plaintiff declared on. 1. Sid. 376. Action against two executors, one of them confesses a small quantity of assets, and the plaintiff replies assets *ultra*; vide the Book at large, which HOLT, Chief Justice, denied to be law, and quoted Long quinto Edw. 4. 108. Bro. Judg. 77.

Before 12 Ed. 2. c. 4. Judge of *nisi prius* could not record a nonsuit. S. C. Salk. 456. S. C. Comy. Rep. 113.

* [652]

And it was further urged, that the entry of a *retraxit* did not discharge the defendant, against whom it was entered, from being party to the issue, till there is judgment given *quod eat inde sine die*; and that cannot be done by a Judge of *nisi prius*, but must be done above after the return of THE POSTEA, and the estoppel begins from that judgment; and a *retraxit* must be entered in court, and in *propria persona*, and cannot be by attorney according to the rule of Beecher's Case (b).

SECONDLY, It was said, that after a *retraxit* against one, the Judge could not try the cause against the other, for his commission was to try an action against two; the parties themselves might have severed in pleading, but the Judge of *nisi prius* has only power to try the action. This is not like a protection, which the Judge

(a) 12. Edm. 2. c. 4.

(b) 1. Danv. Abr. 606.

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Case
against
Rolls

of affize may receive and record, and yet may proceed and try the cause; for if the protection lies not, or lies and is not well cast, the trial shall stand; but if it lies and is well cast, the trial shall go for nothing; but after a *retraxit* well entered against one, the Judge of affize has no more power to try the cause than he has upon a plea *puis darrein continuance*; and there all he can do is to record the plea, and bring it up; and then the other party may reply, take issue, or demur, and the matter shall be determined above.

Quod HOLT, Chief Justice, concessit.

And if the Judge of *nisi prius* cannot discharge the defendant, he still remains party to the issue before him; and the Judge's commission being only to try that issue to which he is party and privy, he can try no other; and he said, a Judge of *nisi prius* could not plead an excommunication in the plea *puis darrein continuance*, though that be a legal disability, and the defendant had no other opportunity of pleading it; and that is a much stronger case than the present, and more deserving of the equity of the statute of York, 17. Edw. 2. c. 4. and 18. Edw. 3. 38. and 2. Roll. Abr. 630. are exprets, that a Judge of *nisi prius* cannot take a plea of excommunication; but he may do whatever is necessarily incident to the trial, as to take a challenge to the array or juror, witness, &c. and it is by subsequent acts of parliament that they have power to give judgments in some particular cases, as felony, treason, *quare impedit*, &c. * *vide* Hard. 112. Style, 104. and the statute of 14. Hen. 6. Westminster the Second, c. 3. for, as Judges of *nisi prius*, they can do nothing but what tends to the trial of the issue, and without a judgment one cannot be severed from the issue, and then it cannot be tried against one without the other.

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Judge of *nisi prius* records plea *puis darrein continuance*.

A *retraxit* is only an agreement not to proceed, and not a confession of having no cause of action.

If ejectment be against two, one dies, suggestion may be of it, and proceed against the other.

To WHICH it was said, that a Judge of *nisi prius* may do whatever tends to the aid or furtherance of the business. 2. Inst. 425. 17. Edw. 3. 22. He may receive a protection. Plea *puis darrein continuance* is recorded every day by them: They may likewise receive a challenge, and record a demurrer to it. *Yelv.* 181. And why may he not as well receive and enter a *retraxit*, which is no more than an agreement on record, that he will not prosecute against that party; and a *retraxit* is not a confession of the want of cause of action, but an agreement not to proceed. And therefore if trespass be brought against two, one may enter a *retraxit* against one, and proceed against the other, for by the *retraxit* the writ does not abate; and yet if he had confessed, that he had no cause of action against one of them, the writ would have abated, and he could not proceed against the other; for such confession falsifies his writ, which a *retraxit* does not; and in ejectment against two, and a joint plea, and *verine*, and before day of *nisi prius* one of them dies, the plaintiff may suggest the death of one of them at the trial, and upon entry thereof proceed against the other; and a defendant may at a day of *nisi prius* *retraxit* verification

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verificationes cognovit actionem, and that may be entered by a Judge of *Cognovit actionem* *nisi prius*; and why may not he as well enter a *retraxit*; for all may be entered at *nisi prius*. the parties are demandable at the day of *nisi prius*, and an entry of their appearance is always on the *poslea*, and the plaintiff is demandable before the jury give their verdict; and surely the Judge may as well record a *retraxit*, whereby the plaintiff agrees to cease his prosecution for ever, as a *cognovit actionem* of the defendant's side, or a nonsuit of the plaintiff's. *Vide Co. Ent. 172.* as to recording of *relicta verificationes cognovit actionem*.

And it was also said, and indeed not denied, that if there be two defendants in trespass, and they plead "not guilty," and at the trial one of them *relicta verificationes cognovit actionem*, that the Judge must record it, and proceed against the other; which was said by GOULD, *Justice*, to be the same in effect with this case.

And then as to his power of trying the issue against the other, was quoted 2. *Rel. Abr. 630. pl. 13.* Two coparceners in a real action, and one of them is nonsuited at the assize, * the Judge of assize may record the nonsuit, and try against the other; and if the defendant had severed in plea, the plaintiff might be nonsuited against one, and proceed against the other; and so is the case in 1. *Cro. 243.* And so he may enter a *retraxit* against one, and proceed against the other; for a *non prof.* does not amount to a *Non prof. does not amount to a release.* *Ibidem.* And it was said, that this was only an action of trespass, which was in its nature several; and therefore though the defendant did jointly plead not guilty, yet that plea would be taken, as the nature of the action, distributively; as much as if each defendant had pleaded not guilty; in which case, a *retraxit* might well be against one, and proceeding against the other. *Vide 11. Hen. 7. 6. 1. Cro. 243.* is against *Hob. 180.* that *non prof.* before judgment is no release, and is law, *vide 3. K. b. 136. acc. to Cro. a.* * [654]

HOLT, *Chief Justice*, agreed the case in 1. *Cro. 243.* to be law; but said there was great difference between a several plea and a joint one; for where many join in a plea, there goes but one *venire facias*, but if they sever, there shall be several *venire fac.*; or if there be but one, it must be special, and it must be mentioned to be for the trial of several issues. And it is true, in trespass against many, and not guilty pleaded by all, it is so far a several issue, that the jury may find some guilty, and acquit the rest, though all join in the plea, for the words are, "*veniunt et dicunt quod non sunt inde culpabiles.*" If a Judge of *nisi prius* allow or disallow a challenge, it is all *sub modo*; for if he allows it, when it ought not to be, or *vice versa*, and that appears on the *poslea*, the trial shall go for nothing; but as to things of necessity, he is to allow them; as of pleas *puis darrein continuance*, as release between day of *nisi prius* and day in bank; because the defendant has no other time to plead it than at *nisi prius*, for that the day of *nisi prius* and day in bank, as to pleading, are the same; and in such case, all he has are the same.

Case
against
Rozell.

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has to do is to receive the plea and return it upon the *posita*, for the Judges of courts above to judge of. And after the statute of *Nisi prius*, and till the statute of *York*, a Judge of *nisi prius* could not record a nonsuit; and therefore during all that time none could be nonsuited at *nisi prius*; and if that statute does not enable him to record a *retraxit*, how can he do it? And surely this entry of a *retraxit* is not a matter of necessity; for in this case now before us, the jury might acquit him that would not confess lease, entry and ouster, and give a verdict against the other, and that had been the true way. And besides, * the party might have entered his *retraxit* above, and therefore likewise it was no matter of necessity to have it done at *nisi prius*; and he said this was a maggot that could not crawl. And he said, that he was not satisfied with the case before put, that one could not plead excommunication in the plea *puis darrein continuance*, at *nisi prius*. And he agreed, that a *retraxit* was not a confession of want of cause of action, but only an agreement on record to cease proceedings against that defendant; and yet in that case, if he may proceed against the other defendant, as he may in some cases, he shall recover his possession and damages against him; and if, by virtue thereof, he would molest the possession of him, against whom the *retraxit* is entered, he shall therefore maintain trespass against him; and besides, if it be done by fraud, the Court upon motion will set it aside. And whereas the cause in 2. Vent. 105. was quoted, where in ejectment against two, one of them would not confess lease, entry and ouster, or does not appear, the plaintiff was nonsuited against both, and had costs taxed against him; and it is said, that he that would not appear, had an interest in the costs, and might release them. Holt said, if there be two defendants in ejectment, and they enter into the common rule, and at the trial they will not confess lease, entry and ouster, the plaintiff shall be nonsuited, but shall have judgment against the casual ejector; but if one of them only does refuse to confess it, he shall be acquitted, and the plaintiff, if he shew title, shall recover the whole against the other. And if judgment be against the casual ejector, and it be made appear that no declaration was rightly served, the Court will set it aside. And if at common law an ejectment had been against one that had nothing in the land, and upon judgment against him another is turned out of possession, there was no remedy for the right owner but trespass, or a writ of deceit; and this still is all the certainty any man has of his possession; and now all we can do is to set such recovery aside, and to punish the offender. And he confessed the case of the defendant's *relicta verificatione cognovit actionem*, that by the Judge of *nisi prius* it may be recorded; but he said, that was because there it would be in vain to try the issue; but it was never attempted, that where there were two defendants and *non prof.* entered against one of them, that the plaintiff could proceed against the other, but where they severed in pleas. And he remembered *Hob. 70. 180. 1. Cro. Wals. v. Bishop*; and the same in 1. *Bulstrode*, and a case * in the year 1650. Ejectment against

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two,

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two, one confessed the action, and the other pleaded not guilty, and it was questioned, whether the plaintiff might enter a *non prof.* against one of them, and have judgment against the other; and then it was held he could not; and a difference was taken between trespass and ejectment, but he said he did not take that to be law; or that the writ should abate by a *non prof.* against one; or that there was any difference between trespass and ejectment, in that point. *Vide Rast. Ent.* 66. 72. Assize against two, the one is found guilty, and the other acquitted, and judgment and damages against him that was acquitted, and for the other; and the precedent in 3. Co. 50. *Sir George Brown's Case* is in point, so in case of ejectment, and why may it not be so in this case? He agreed, in ejectment they could not be nonsuited against one, and proceed against the other; but if there be two defendants, and one of them will not appear, or will not confess lease, entry and ouster, he may be acquitted, and the plaintiff proceed against the other; and he who is acquitted is a party to the record, and if he cannot have a writ of error, it is because he is not hurt by the judgment; and if there could be a verdict against him, he should have a writ of error; and if there had been an actual ouster, as formerly, he should have a writ of error. If one confess lease, entry and ouster for as much of the premises as are in his possession, the jury shall inquire against him alone for so much; and if the other will not appear, or not confess, &c. there shall be judgment for so much of the premises as are in his possession, judgment against the casual ejector. And where one will not confess lease, entry and ouster, he shall be acquitted; and that will be as well for the plaintiff, for as to him he may have the Judge's certificate for judgment against the casual ejector. If one be nonsuit for the defendant's not confessing lease, entry and ouster, upon certificate thereof there must be judgment against the casual ejector; and may not his certificate of an acquittal for the same cause have the like effect? And if there be several defendants, and some confess for all in their possession, and there be others will not do it, let them that will not be acquitted for that reason, and the trial go on as to the rest, and judgment be for so much upon the verdict, and for the rest against the casual ejector; and that will fetch the possession equally well for the plaintiff. And he said in my *Lord North's* time, if there were several defendants, and one of them would not confess lease, entry and ouster, the plaintiff was nonsuited against all, and had judgment for the whole against the casual ejector; and that he said was hard, to turn one out of possession for the default of another, who was willing to defend his title. And he said he never knew a *non prof.* against one when two had joined in a plea entered at *nisi prius*, but it might be done above, and a *distringas* taken out as to the other only.

GREY
against
ROLLS.

In ejectment cannot be nonsuited against one, and proceed against the other.

If one defendant will not appear, or confess lease, &c. he may be acquitted, and plaintiff proceed against the other.

As to him who will not appear, judgment shall be against the casual ejector for so much on the Judge's certificate.

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At last it was held well by GOULD and POWIS, *Justices*, against HOLT, *Chief Justice*; and error was brought before the lords, and judgment affirmed.

Case 1057.

Craddoc *against* Glin.

On suit brought
against an attor-
ney for money
received to the
plaintiff's use,
moved to have
his own bill
taxed, and an
allowance of
what was due.
Court will not
interpose.

ACTION against an attorney for money received to the plaintiff's use.

The attorney shewed to the Court that he had been employed as an attorney for the plaintiff, and had applied some of his money towards paying for his labour, and some to a solicitor in the cause; and moved to have his bill taxed, and an allowance of what should then appear due to him.

CURIA. If the plaintiff had applied by motion to have us to compel an attorney, by virtue of our power over him as our officer, to pay the money, there, soasmuch as that is discretionary in us, we would not help the plaintiff unless he did the fair thing of his side; but here when he demands no favour of us, we cannot deny him the law, and let the defendant take his legal remedy against the plaintiff (a).

(a) But see now the statutes of the case of Mitchell v. Oldfield, 4. Term 2. Geo. 2. c. 28. the 2. Geo. 2. c. 4. and Rep. 123.

Case 1058.

Johnson *against* Allen.

One tenant in
common may
maintain eject-
ment against the
other,

PER CURIAM. If two tenants in common be, and one of them do actually oust the other (a), he may maintain an ejectment against him, and he shall not be admitted a defendant without confessing lease, entry and ouster.

And in that case the plaintiff shall only recover his purparty *pro indiviso*, and shall be put in possession of no more.

In such case no
mean profits to
be recovered.

And in such case the sheriff shall give the same execution as he would do of rent upon assize, and there can be no mean profits at all recovered in case of tenants in common.

But if one enter only upon another, claiming only as tenant in common, and the other brings an ejectment, it will be hard to enforce the defendant, who has done nothing but as tenant in common, to confess lease, entry and ouster (b).

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And here **IT WAS RULED**, that there should be a confession of lease, entry and ouster, in case it should appear to be an actual ouster upon evidence at the trial; *scilicet* not.

To obstruct
making the ut-
most profit of
his moiety is an
ouster,

And **IT WAS AGREED**, that to obstruct one to make the utmost profit of his moiety, would amount to an ouster, but not to consent to have the rents raised upon the tenants would not.

(a) See *accord.* Fairclain, on the De-
sire of Empton, v. Shakteton, 5. Burr.
364. Doe, on the Demise of Fisher
and Taylor, v. Proffer, Cowp. 217.

(b) Hob. 120. Co. Lit. 242.

Vapor

Vaspor against Edwards.

Case 1059.

TRESPASS *quare clausum fregit*, and fed his grafs with a pig. If distrefs escapes, the person distraining cannot bring trespass, unless he shews the escape was without his default.

The defendant as to all, except the trespass by the pig, pleads not guilty; and as to that, that the plaintiff ought not to have his action, for that he had taken the pig *doing the damage*, and impounded it in a common pound at 7. and there the said pig *ex causâ præd. detinuit*.

The plaintiff confesses the taking and impounding, but that afterwards the pig, without his consent and will, did escape out of the pound. S. C. 1. Salk. 248. S. C. Holt, 256. S. C. 1. Ld. Ray. 719. S. C. 11. Mod. 21. S. C. Blencowe's MSS. 214.

And upon this a demurrer.

THIS CASE depended a long time, and was several times spoke to at the Bar.

IT WAS SAID, to maintain the replication, that a distrefs is but a pledge (a), and if one be defeated of his pledge, and has no remedy over, he shall have recourse to his original remedy for the thing for which the pledge was taken. If one bail goods as a pledge for money, and the bailee be robbed of them, he shall maintain an action for the money. And here is no default in the plaintiff, for he could do no more than to impound it; and he could not justify the tying of it, so as to secure it from escaping; *vide* 27. Aff. pl. 64. And the whole default is in the defendant: FIRST, In doing wrong to the plaintiff; and again, by not tendering amends, whereupon he might have his hog again; *vide* 2. Inst. 341. And if the plaintiff is defeated of his distrefs, through the fault of the defendant, he may distrain *de novo*; as if a distrefs die in the pound overt for want of food, the distrainer may distrain *de novo*; *vide* Dy. 280. b. Hob. 61. 15. Edw. 4. c. 10. Ergo he may also bring trespass if he please. And if debt be brought for rent issuing out of land in the same county, levied *per* distrefs without more will not be a good plea; but he must also make a special conclusion *et sic riens arriere*, so that the taking the distrefs and detaining thereof is not the material matter, but the rent's not being behind; and where no such conclusion is, the lands are in another county, and then it would not be material to make such special conclusion, because the rents being behind cannot be tried by men of the county where the action is brought. 22. Hen. 6. 13. pl. 9. 36. Hen. 6. pl. 1. 35. Hen. 6. 19. *Rass. Ent.* 175. *Co. Ent.* 49. If distrefs die in pound overt for want of food, may distrain *de novo*.

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TO THIS it was said, that in this case the plaintiff had his choice to distrain or bring trespass; and when he has made his election, when has made election, shall have no other remedy, unless that be ineffectual by the act of God, or the party. Person may distrain or bring trespass, but,

(a) See 2. Leon. 174. that a distrefs is but a pledge.—NOTE in M. S.

and

FACTOR
against
EDWARDS.

and taken a distress, he shall never have recourse to any other remedy till that remedy proves ineffectual through the act of God, or the wrong of the defendant, neither of which has happened here; and therefore the case of the distress dying in the pound for want of food, that is in a pound overt, or dying in any pound by any other chance, without default of the distrainer, is not like this: If the defendant had brought a replevin here, the sheriff must have returned an *elongatur*, and could not return the escape; *vide 5. Hen. 7. c.* . but he may return that they escaped, and came back to the owner; *vide Br. tit. Return, 75.* And here it does not appear that the pig came back to the defendant again, which shews the plaintiff is not discharged of it, nor we chargeable for the trespass for which he is supposed to have a distress; and for which, if a replevin were brought, and an *elongat.* had been returned, as it ought to be, a *withernam* would go against the plaintiff of his own cattle. And if this had been a case of rent, levied *per* distress would be a good plea; for the meaning of that plea is not that the money is actually paid, for then *nihil debet* or *riens arriere* had been the proper plea, for the meaning of it is, that the party has taken a distress, and still has it as a gage for his rent: And it was said, the escape here was through the default of the distrainer, for he might have put the distress in a safe pound; which if it were broke, he had a remedy by a *parco fracto*; or if this be the common pound, and not capable of holding the distress, it was his folly to make use of it, when he might put it into any other safe place, and make that his pound; or perhaps he may have remedy against the lord for not maintaining a sufficient pound; so that still he is at no prejudice, or at least it is such a one as comes through his own default, and then he may thank himself for it; for it was also denied that the distrainer could not tie the distress, but it was agreed it will be at his peril, if through such tying the distress comes to any hurt, for then he must answer for it; and the case of 27. *Ass.* warrants no more; for the distress must be in a convenient pound, and if it be not such, and a distress is put into it and abused, though it be * what is called a common pound, the distrainer shall answer for it. And therefore if a live beast be put into a place in which there are sharp spikes, by which the beast is stuck, though it be a public pound, the distrainer shall answer for it, for it is his pound, and it is he that shall have a *parco fracto* for the breach of it, and not the lord; *vide Do. 7. & Stud. c. 27.* And it was said, there were but two sorts of pounds, *viz.* overt and covert; overt where the owner may come and feed them without being a trespasser, and covert where he cannot have such access. If the cattle die in a pound overt for want of fodder, or without any default in either party, the loss is the owner's, which shews, that if they die through any default of the distrainer, as for want of food in a pound covert, it is at his peril; so of other defaults, as may be reasonably collected from the said book of *Do. 7. & Stud. ubi supra.* And it was said that

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A common pound is the pound of the distrainer, and to answer for all the mischief that he suffer by its being a bad one.

If cattle die for want of food in a pound overt, the loss is the owner's.

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that pound was not like a common gaol, or a hayward like a gaoler, but only a common servant to all that used the pound.

Vassor
against
Edwards

To all which HOLT, *Chief Justice*, strongly inclined. And he added this diversity between *rent* and *damage feasant*, for one may distrain any cattle he finds on the premises for rent, but in the other they must be actually doing damage, and are only distrainable for the damage they are then doing, and continuing; for if they have done damage to-day and gone off, and come again at another time and are doing damage, and are taken for that, and the owner tenders amends for that damage, the party cannot justify keeping them for the first damage: And he said farther, that if ten head of cattle are doing damage, one cannot take one of them and keep it till he be satisfied for the whole damage, but may bring trespass for the rest. And he said, that if distress be stole or set at large by a stranger, he shall not be answerable for it; but even in that case if replevin be brought, and an *elongatur* returned, as it must be, there shall be a *withernam*, and the distrainer liable till he shew that matter, which being no default of his will excuse him; and the plaintiff in replevin may work beasts taken in *withernam*, because they are delivered to him in lieu of his own; and when the matter is determined, if it go for the plaintiff in replevin he shall have judgment for the beasts in *withernam*, if his own be not to be had; but if it be for the defendant he shall have his beasts again, and may keep the distress till he be satisfied. And when one distrains *damage feasant*, he has an adequate satisfaction for his damage till he lose it without default * in himself, for when he has return irrepleviable, he can have no other satisfaction but to keep the distress till he be satisfied. And *damage-feasant* is the strictest distress that is, for the thing distrained must be taken in the very act; for if they are once off, though on fresh pursuit, you cannot distrain them. If tender be made of damages before the taking, the taking is unlawful, if after the taking, and before impounding, then the detainer after is unlawful; but tender comes too late after the impounding to make either the taking or detaining unlawful; but still after the impounding the distrainer may take the amends, and let go the distress, if he please. And if a beast has done more damage than he is worth, let him not distrain, but rather take his action. And before the statute of 23. Hen. 8. c. 15. no damages were given in avowry for *damage-feasant*, but only a return irrepleviable of the thing distrained.

Vide 1. Inst.
161. a.

Beasts taken in
withernam may
be worked, be-
cause are given
in lieu of the
others.

• [661]

Distress for *da-
mage-feasant*
must be in the
very act.

And now this Term, after great consideration, THE COURT delivered their opinions *seriatim*.

GOULD, *puisne Judge*. The plea in bar is bad, and the replication good. If the distress had died in pound, though after judgment irrepleviable, he might distrain a-new, or bring his action; for it is, as *Hobart* says, the effect of the agreement of the parties, or act in law, *Hob. 61. 15. Edw. 4. 10. Doct. & Stud. c. 27.*

for

Hilary Term, 13. Will. 3. In B. R.

Passes
against
Kewness.

• [662]

for the party has the goods as a pledge, and as long as that continues he shall not have any other remedy; but once it ceases to be a pledge, his action is restored to him, and it is in his election whether he will retake his distress or bring his action of trespass: If the owner break the pound, and let distress go, the distrainer shall have a *parco fracto*, or may retake the distress. 1. *Inst.* 45. 34; *Hen.* 6. 18. If one distrain, and as he is driving to pound they escape, I may pursue and retake them, or bring trespass, and the reason is the same here. If distress escape out of pound, the party may retake him, 27. *Aff. pl.* 64. but he cannot tie, for that would be a misuser, and would amount to a conversion. If the distrainer suffer the distress to escape by his own consent, he discharges the trespass; or if the defendant had alledged any default in him, that perhaps would alter the case; so that he concluded the replication was good. And the plea is bad, it is that *nomine districtionis* he took and impounded; but that is not enough, for he should have said farther, that he still does detain the distress. If a *scire facias* be brought upon a judgment, and the defendant pleads that he has been taken in execution, that will not be enough, without saying farther, that he still continues in execution. *Rast. Ent.* 175. Where a distress for rent is so pleaded, and shewed to continue, so here as long as it is shewed that the plaintiff has a gage or pledge, so long it is a bar, but the minute that gage ceases against the party's will, the action revives. And in all cases where one pleads a plea, which to be good must be continued, there he must shew the continuance; as 12. *Hen.* 8. 2. 13. *Hen.* 8. 15. as if a man makes title under tenant for life, he must aver his life. *Yelv.* 223. And he held the return in replevin in this case might be made of the special matter, as well as if the distress had died in pound, or escaped and came back to the owner, which may well be done. *Vide Br. Return of Writs*, 125. *Dalt. Ret. Brev.* 104.

Powis, Justice. It would be of dangerous consequence, if cattle taken *damage-feasant* should escape out of pound without default of him who did distrain, and that he thereby should become remediless; for a distress, whether for rent or damage, is but a gage. 2. *Cra.* 148. and they could not be sold as common law even in the case of rent, nor now for *damage-feasant*; and the distrainer cannot use them though it be for their good, and therefore he cannot tan green hides to preserve them, *Cra. Eliz.* 783. nor milch-cows to preserve their milk, or save them from hurt, 1. *Kol. Abr.* 673. though it be allowed, 2. *Cra.* 148. that kine may be milked to prevent their being spoiled: But I take *Rolle* to be law; then if it be a gage, it is a gage for satisfaction; and if that be never made, why shall the party have no remedy if there be no default in him? for it is as true a rule, that one shall be satisfied once, as that he shall not be satisfied twice.

If cattle distrained be put in pound overt, the owner at his peril must feed them; and if they die, the distrainer shall bring his action, and die, action may be brought, or such distress.

action

Hilary Term, 13. Will. 3. In B. R.

action or distrain again, *Dy. 280. 1. Inst. 47. Doct. & Stud. 102.* and the reason of that is, because he lost his pledge without fault in him: Another reason why he ought not to lose his remedy is, because he cannot otherwise secure them than by impounding, for he cannot tie them; *vide 27. Ass. ubi sup.* So if they be stolen out of the pound overt he is not liable nor remediless; but if he should put things into the pound overt which are not proper to be put there, and they be stole, he shall answer for them; but if they be proper for pound overt, the owner must keep them from thieves, as from starving. *1. Inst. 47. b.*

Voxes
against
EDWARDS.

So if stole out of it.

If distress be stole out of pound, and *elongat.* be returned, the distrainer to prevent a *withernam* may shew that they were stolen, *32. Hen. 6. 27. b. Br. Ret. Brev. 135. Nat. B. 74.* and some Books say the sheriff may return it. If the cattle die in pound, he may distrain in case of rent, or bring debt; *ergo* if they die in case of *damage-feasant* he may bring trespass. *15. Edu. 4. 10. Dy. 280. Hob. 61. Doct. & Stud. c. 27. f. 112.*

* [663]

But notwithstanding all this, the action will not lie here, for want of this material word in the replication, that the distress escaped without default of him; for it is not enough his gage should be lost without his consent, but it must be without his default too, to intitle him to an action. And he held the plea good, though the words *adhuc detinet* were wanting, for it is a plea in bar, and good to a common intent.

TURTON, *Justice* The plea is good; the plaintiff had his election of two remedies, trespass or distress, and using of one is an utter waiver of the other. *2. Co. Sir Rowland Hayward's Case. 9. Co. 51. and Hob. 59.* an election of one is an implied rejection of the other. And distress sufficient to satisfy the rent is a good plea in bar to debt for the rent; so by parity of reason in trespass. And he concurred with POWIS, that the replication was bad for the cause above; and here was defect in the plaintiff to put the distress into such a pound, when he might put it into a safer, as every-body must know he might have done; for a common pound of a manor cannot be looked upon safe for a pig; so he concluded against the plaintiff.

HOLT, *Chief Justice.* I always was of the opinion that now I am of, that judgment ought to be for the defendant; for it is plain there was a time when the plaintiff could not have maintained this action, *viz.* when the distress was taken; then the defendant has pleaded this matter, which did take away the action; and so a matter is pleaded which shews the plaintiff had not an original cause of action; and if the plaintiff will admit the truth of that matter, he ought to shew some special subsequent matter whereby he is now become intitled to that action, whereof he was originally ousted by the plaintiff's plea, or remove the matter that is made a bar to him. And here the taking the hog *damage-feasant*

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As long as a distrefs is detained, it is a bar in trespass. *feasant* is *prima facie* a bar of the action; and it is agreed, that if distrefs is taken *damage-feasant*, as long as it is detained it is a good bar in trespass.

Bar is good to a common intent.

* [664]

Distrefs is not obliged to be in a common pound, but in pound overt.

If pound overt be broke, *parco fracto* lies, tho' in another's soil.

But it is objected, that it is not shewn that the hog is detained still; but surely a bar is good to a common intent, and it is enough for him that is distrained to shew a distrefs * taken, and it behoves the other side to shew how the possession of it happened to be lost, and since he has lost possession he knows best how; if he had shewn that the defendant had taken it out of pound, it might be somewhat, or even that it escaped out of pound and run home to the defendant, and that he came upon fresh pursuit to take it, and had been hindered by the defendant. And surely it is the default of the defendant that he put it in an ill pound; surely none will say, that if a hog be put into such a pound as cannot keep it, and then it escapes, that he can afterwards bring trespass; and it being a common pound makes not to the case; for be the pound common or not, it is the pound of him that uses it for that time; and the law does not require a man to put the distrefs in a common pound, but only that it be put in a pound overt, or be fed at peril of the distrainer, and taken care of by him; and common pounds are either by custom, tenure, or agreement among the inhabitants of a vill or manor, and not by common law. But if there be a common pound, and one will use it, he must take care to keep it; and if it be broke he shall have a *parco fracto*, though it be another man's pound, as in another man's close, which shews it to be the pound of him that uses it as such. Then he ought to keep his pound, or if it be out of repair, and he put cattle in it, and they escape, is it reasonable he should take advantage of his neglect? Surely it is not; for the distrefs is for his benefit, and the law appoints none else to take care of it; and though some pounds have haywards, who are officers in leets, yet the law takes not any notice of them.

And to say that he does not shew in the bar that the plaintiff does detain it yet, it may be he does not detain it; for suppose it be replevied, the plaintiff's way would be to avow, and pray return for the damage; and if pending the matter upon the replevin this action were brought, would you have it set forth in pleading this matter, that he still detains the hog? That would be false in fact; so the plea, *prima facie*, is good till it be avoided; as levied *per distresse, et sic nihil debet*; and though the precedent in *Rastall* be *et adhuc detinet*, yet that is no matter triable, but the taking the distrefs is what is triable: And so it was there, for if a man distrain for rent or *damage-feasant*, upon replevin he must justify the taking, and not the detainer; and then, if upon the avowry it appear that he had good cause, he shall have return; if the distrefs be elained or embezzled, there shall go a *withernam* upon that matter * returned on the *retorno habendo*; so if there might be a replevin, whereby the plaintiff would be dispossessed of the distrefs till return, that would discharge the action: And when it

* [665]

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it is pleaded that he distrained the cattle, it shall be intended that he has them still, or that there is a replevin pending; or if it be otherwise, it ought to come of the other side; for if the distress be taken from him by replevin, as it well might be, that will not revive the action of trespass: If it escaped through his own defect or neglect, that will not revive the action. And here he once had the distress in his possession, and is best able to give an account of what is become of it; and if he does not shew that he has lost it by some means whereby the action is revived, it shall be intended to continue discharged. And here it does not appear how the escape was, but only that it was without the consent and will of the plaintiff; and all that might be, and yet be through his neglect; and if so, the action not revived. And suppose the door of the pound had not been locked, whose fault is it? Is it not the fault of the plaintiff, who ought to have shut it? So the defendant has shewn a distress, which is *prima facie* a discharge of an action of trespass; then the plaintiff ought to shew how it came to be revived. If cattle die in pound, it is true the action is revived; why? because it is the act of God; surely then there is a great difference between the death of the distress in the pound, without the default of the distrainer, and an escape of them, which must happen through his default, and be taken so till he shew the contrary. And the difference between an escape of a distress out of pound, through neglect or other default of the distrainer, and without his default, is so material, that in one case the action of trespass, &c. shall be revived, and in the other not. And I always heard a bar was good to common intent; because it is to excuse from a charge; but a replication must have a general certainty, because it is to destroy the excuse of the defendant, which is always received favourably.

VASSOR
against
EDWARDS.

If escape out of pound without distrainer's fault, action of trespass revives, else not.

And judgment was given for the defendant.

The King *against* The Village of Andover.

Case 1060.

THEIR CHARTER is, that the mayor and major part of the corporation may turn out whom they please.

Charter of Andover.

And *PER CURIAM*, after argument, There is no remedy for it, their constitution being so.

* [666]

* Anonymous.

Case 1061.

HOLT, *Chief Justice*. If one attorney give leave to another to practise in his name, he shall answer for all the villanies and practices as he shall act in his name (a).

Attorney, who gives another leave to practise in his name, is answerable for what is so done.

(a) See 2. Geo. 2. c. 23. *Oppenheim v. Harrison*, 1. Burr. 20 and 1. Com. Dig. "Attorney" (B. 15.).

Anonymous.

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Case 1062.

Anonymous.

Mandamus will not lie to swear in a steward of a copyhold court.

5. Com. Dig. "Mandamus" (A.). (B.).

MULSO moved for a *mandamus* to swear in a steward of a copyhold court (a).

HOLT, *Chief Justice*. The true reason of *mandamus* was when aldermen, capital burgessees, or such other officers concerning the administration of justice, were kept out, to swear them into, or at least restore them into their places; and we ought not to grant it to swear a registrar for a bishop, though it be an office of a public nature (b); and he said he would not care to do it for the steward of a leet, though heretofore it were used to swear a physician of the college (c); and it is rare to grant it where one has any other remedy (d); and here it is a private officer to do service for the lord.

And it was not granted.

(a) That a *mandamus* lies for the steward of a court leet see 1. Sid. 40. 169. Ray. 12. 2. Lev. 18. 2. Stra. 943. 1807. 1. Will. 283. but not to restore the steward of a court baron, Fitzg. 194.

(b) Rex v. Ward, Stra. 893.

(c) 1. Sid. 29. Carth. 92. See also

2. Show. 178. 1. Lev. 29. contra.

(d) See Rex v. Barker, 3. Burr. 1264. Rex v. Wheeler, B. R. H. 99.

Case 1063.

Taylor against Reignolds.

Conuance of pleas no good return to a *babeas corpus*.

S. C. Fortesc. 244.

Ante, 643. Salk. 148.

TO a *babeas corpus* to the stannary courts it was returned, that they have conuance of pleas by the charters of *Edward the First*, and another of *Edward the Third*, and that this matter might be well returned were quoted *Style*, 255. 1. *Roll. Abr.* 547, 548.

HOLT, *Chief Justice*. Conuance of pleas, or exempt jurisdiction, were never returned to a *babeas corpus*; for then they might return a falsity to support their jurisdiction, which would not be traversable, and so a subject would be ousted of the privilege of suing, or being sued, in the king's superior court, without an opportunity of controverting the matter; and he quoted the case of *Bishop v. Percival*. And as to an exempt jurisdiction, that always is for the benefit and ease of the residents within such a vill, borough, &c. not to be sued out of their vill, &c. and then surely they may waive that benefit, and remove their causes to the superior courts. And if one, who is within an exempt jurisdiction, be impleaded out of it, his way is to plead it, and the lord has nothing to do with it; but as to conuance of pleas, that cannot be pleaded by a defendant, but must be demanded by the lord of the franchise, his bailiff or attorney.

If one who is within an exempt jurisdiction be sued out of it, he must plead it.

Conuance of pleas cannot be pleaded, but must be demanded by the lord.

Vincent

* Vincent *against* Preston.

Cafe 1064.

PER CURIAM. When once a thing is made a *conciliam*, one cannot enter judgment, or make any other alteration, without leave of the Court; and the case of *Crofts v. Green* was quoted, which was, Two breaches were assigned in covenant, and an answer only to one of them, and for that a demurrer; but before it was put in the paper, judgment was by *nihil dicit* entered upon that which was not answered, and well; and all the difference between that and this is, that here it is made a *concilium*; and yet judgment by *nihil dicit* entered without leave of the Court. And it being again moved by the Attorney General, who seemed to satisfy the Court, that the judgment might be well entered for that part of the declaration which was not answered in the same Term, though it was pretended to be a discontinuance; yet because they had entered it up without coming to the secondary, which is irregular, it being a judgment for want of plea, the judgment was set aside.

Where a thing is made a *concilium*, judgment cannot be entered without leave of the Court.

S. C. ante, 603. Tidd's Pract. 257. 260. 478.

Taylor's Cafe.

Cafe 1065.

THE QUESTION, in a motion made by MEADE, was, Whether a service of a declaration in ejectment on Sunday were good now upon the statute of 29. Car. 2. c. 3.?

Declaration cannot be delivered on a Sunday.

And PER CURIAM, It is not; for it is a process, though not a judicial one; for it is compulsive on the party to appear; and it may as well be said, that service of a summons in a real action may be good on Sunday (a).

(a) See *Brookbank v. Allenfon*, ante, Broome, 1. Black. Rep. 526. S. C. 275. *Waldegrave's Cafe*, ante, 606. 3 Burr. 1595. S. C. 6. Brown's P. C. Walker v. Town, Bar. K. B. 300. 132. and *Morgan v. Johnston*, 1. H. Cornwallis v. Heyle, Fort. 373. Swan v. Bl. Rep. 628.

The Parish of Halstead *against* The Parish of Melford. Cafe 1066.

AN ORDER to remove a wife and children to the place of the husband's last legal settlement:

Order to remove a wife and children to the settlement of the husband, ill.

And it was held bad as to the children, for they might have a legal settlement different from the husband, but it might stand as to the wife.

2. Salk. 528. Fort. 322. 313. Foley, 269. Stra. 580. Burr. S. C. 153. and see the whole law respecting the settlement by parentage, 1. Conitt's P. L. 19 to 64. 2. Conitt's P. L. 773.

BUT ANOTHER EXCEPTION was, That there was no adjudication that any of them were likely to become chargeable to the parish from whence they were removed: and though it was said, that they came to settle there contrary to law; yet for the last exception the order was quashed *in toto*.

An order must state the pauper likely to become chargeable.

2. Salk. 491, 530.

Sett. & Rem. 39. 21. 1. Stra. 77. 527. 2. Conitt P. L. 772 to 780.

(a) But now by 35. Gen. 3. c. 101. no person can be removed until actually chargeable.

* [668]

Case 1067.

* The King *against* The Parish of Minton.

Order confirmed on appeal is final to that parish; so if it be not appealed from.

PER CURIAM. If one parish make an order for the removal of a poor person to another parish, and that order is confirmed upon an appeal, that parish is for ever concluded against all other parishes; so is an order made, and not appealed from, final.

But the exception was taken, that the appeal, on which an affirmation is final, ought to be to the *general quarter-sessions*, and here it was said to be at the *quarter-sessions*, without more.

But forasmuch as it did appear to be at the sessions held on such a day, which was the very day appointed by the statute for the holding of the general quarter-sessions, the Court would intend it the general quarter-sessions (a); *multum renitente* HOLT, Chief Justice: For since the act gave the appeal to a particular jurisdiction, they that would go upon that statute ought to pursue it precisely, and expressly shew it, without leaving any room for intendment.

(a) See *Rex v. Shaw*, ante, 203. and the Note of *Rex v. Chisholme*, ante, 203. *notis*.

Case 1068.

The King *against* Bishop.

Outlawry of murder on confession of attorney general that had no lands. S. C. ante, 626. Ante, 544, 545.

HE came to reverse an outlawry of murder, and upon confession of THE ATTORNEY GENERAL that he had no lands or tenements, which confession recited, that it so appeared to him on affidavits, the outlawry was reversed for the common error, that the Court was not said to have been held *pro com*. So it was reversed without any *scire facias* to the lords immediate and mediate; and he was sent prisoner to the *Old Bailey*.

Case 1069.

Anonymous.

If one defendant in trespass dies *puis darrein continuance*, and at trial his default be recorded, his death may be suggested, and judgment had against the other.

HOLT, Chief Justice. In trespass against two, and after issue joined, and *puis darrein continuance*, one of them dies; the plaintiff may at the trial get his default recorded, and proceed to trial, and have a verdict against the other; and he may before judgment come and suggest the death of the defendant who died, and have judgment against the other. And taking the inquest against one, where there are two defendants, and one of them dies, *puis darrein continuance* cannot be error, if the default of the other be recorded, and his death be suggested before judgment; and one cannot plead death of a party in abatement, *puis darrein continuance*.

AT

A T,
THE SITTINGS
AFTER
HILARY TERM,

I N
The Thirteenth of William the Third,

AT
Guildhall,

BEFORE

Sir John Holt, Knt. Chief Justice.
Sir Edward Ward, Knt. Chief Baron.
Sir Henry Hatfell, Knt. Senior Baron.

• The City of London *against* Wood.

• [669]
Case 1070.

IN AN ACTION brought in THE MAYOR'S COURT against Wood for four hundred pounds as a forfeiture, for that he being duly chosen sheriff did not serve, or otherwise discharge himself by fining, &c. according to the act of common council made in the seventh year of *Charles the First*, it appeared *the plaintiff* was levied in the court of the mayor and aldermen on the fifteenth of *November*, and that the defendant gave bail for his appearance the next day, *viz.* the sixteenth; and instead of continuing from the fifteenth to the sixteenth, that day is given from the said fifteenth to a certain day in *June*; and then the entry is, that the cause was removed by *habeas corpus* to the common pleas, and sent down by *procedendo*. And then the defendant pleaded "*nil debet*," "*et hoc parat. est verificare, ut liber homo* of the city," and offers to bring six freemen of the city to be his compurgators; and a demurrer to this plea; and judgment against the defendant; of which this error is now brought before the said Judges commissioners.

Debt on a by-law in the mayor's court for refusing to serve as sheriff.
Ante, 269.

Hilary Term, 13. Will. 3. At Guildhall.

THE CITY OF
LONDON
against
WOOD.

HATSELL, one of the Barons of the Exchequer, who argued first, divided the case into four points :

FIRST, Whether *wager of law* held in the case ?

SECONDLY, Whether there were a *discontinuance* ?

THIRDLY, In case there were a *discontinuance*, whether it was now amendable by the record in the mayor's court, supposing that to be right ?

FOURTHLY, Whether this action be brought in a proper court, *scilicet*, that of mayor and aldermen, it being for a forfeiture to the city ?

Wager of law
will not lie.

* [670]

And PER LUY, Wager of law lies not here, for that never lies but in respect of the weakness and inconsiderableness of the plaintiff's ground or cause of demand ; and when the ground of his demand is so small and weak that the defendant's oath, and that of compurgators, may be looked upon as an equal consideration with it, then a wager of law may well be ; but never where the foundation of the demand is of greater regard than the defendant's oath, then it never lies. 1. *Inst.* 292. it lies not where there lies a specialty or deed to charge the defendant ; * but only where the cause of action is only a bare parol transaction, which as it may create a duty, yet it is such a duty as may be discharged in the same manner that it is contracted ; and the reason of it is grounded upon the presumption of law, that one for no worldly consideration will forswear himself ; and it is an argument that the matter is of no great value, that the plaintiff did not take care to have better security for it than the slippery memory of man, and the incertainty of a verbal contract : so that since the lien or tie was so light, it is no wonder if the law will lightly discharge it. Another reason of a wager of law is laid down in 2. *Inst.* 45. b. that the defendant might have witnesses of his discharge, who might be dead, as none can keep his witnesses alive ; and since nothing appears to charge him but a parol agreement, which might have been discharged with the like solemnity, which the defendant might have proved if his witnesses were not dead, for that reason too the law thought convenient to admit of a discharge by wager of law. Nor is there any hardship in all this, because the plaintiff might have prevented it by providing a specialty ; but he held the first reason to be the only true reason, *viz.* the feebleness and exility of the ground of the plaintiff's demand ; and it suffices, that the nature of the defendant's discharge be of equal validity with the ground of the plaintiff's charge. And wager of law is allowable in five cases : first, In debt upon simple contract, which is the common case ; secondly, In debt upon an award upon a parol submission ; thirdly, In an account against a receiver for receipts by his own hands ; fourthly, In detinue, though the bailment were by the hands of another ; fifthly, In an amercement in a court-baron, or other inferior courts not of record. And in every of these instances the action

Vide 2. Saund.
65.
Sid 160.
1 K. 599
Vide Rol. Ab.
140
2. Co Beecher's
Cas
Mo. 276.

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is grounded upon a feeble foundation, and of small consideration in law.

THE CITY OF
LONDON
against
WOOD.

The case of an amercement in court-baron is nearest to the present case of any, though nothing like it, for such amercements are generally for private matters, as inclosing or over-charging of commons, or other private transgressions; but this offence, for which the penalty is laid here, is of a public nature, and concerns the administration of justice in the service of sheriffs of *London* and *Middlesex*. And though this penalty be inflicted by an act of the court of common council, which is no court of record, yet it is a court so vastly different from courts baron, or such other petit courts, that in 4. *Inst.* 245. my Lord Coke does not stick to * compare it to the court of parliament, where the mayor and aldermen represent the upper house, and the commonalty the house of commons. And what immediately concerns the good government of *London*, does very nearly concern the whole kingdom; of which *vide* 8. Co. 187.

* [671]

The king, as fountain of justice, has the nomination of sheriffs all over the kingdom; and since he, by his patent, has delegated that power for *London* and *Middlesex* to the city of *London*, as incident thereto, they must not only chuse sheriffs, but may also compel them to serve; for otherwise here would be a failure of justice; and the consequence of that in these two counties would be of extreme danger to the whole kingdom. The office is of very great concern, for he has the custody of the county: besides, it concerns the public revenue, part whereof he collects; and it is given for a reason in *Slade's Case* (a), that a wager of law lies not in *quo minus*, because the king's revenue is remotely concerned, upon suggestion, that the plaintiff is indebted to the king, and lets able to pay him by the defendant's detainer of his debt; *ergo à pari* in an action concerning the acceptance of an office relating to the king's revenue, he ought not to be received to his wager of law. Besides, here is a contempt in the defendant, which he ought not to be allowed to swear off. Also all the matters that charge him are facts notoriously known, in which there never are any precedents of wagers of law. Again, when the matter of the charge is pregnant with matter of law, there ought to be no wager of law, for that were to swear to the law; as in debt against husband for clothes taken up by the wife, the husband shall not wage his law, because it is a point of law, whether he be liable or no, *viz.* whether the clothes were for necessary apparel of the wife, without which he is not liable. Then the very custom of *London* excludes wager of law in some actions, as in debt for diet; 1. *Eaw.* 4. 6.; *Bra. Examination*, 18.; the statute of 38. *Edu.* 3. c. 5. before which no wager of law could be against a *Londoner*; *Er. Ley Gager*, 94. Another reason against the wagering law here is, that by custom of *London* the common council may make by-laws for the better

City may compel serving of sheriff.

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THE CITY OF LONDON *against* WOOD. ordering of the city ; and that custom is confirmed by MAGNA CHARTA, and sundry other acts of parliament. So that this being a penalty so warranted is of too high a nature to be avoided by a wager of law. *Vide* 1. *Vent.* 196. 261.

* [672]

Action cannot be brought by mayor and commonalty in a court held before the mayor and aldermen.

* But another error assigned is, that this action is brought by the mayor and commonalty of *London*, in a court holden before the mayor and aldermen ; and the record says, that the mayor and commonalty of *London* came before that court, that is, the mayor and commonalty came before the mayor and aldermen ; so that the mayor is both judge and party, a thing against natural justice. And this I hold to be error ; for though the mayor be not sole plaintiff, nor sole judge, yet he is essentially plaintiff and judge ; and the case of the bailiff of *Norwich*, in 2. *Ro. Ab.* 93. differs from this : One brings an action before the bailiff and steward of the town, and pending the action the bailiff dies, and the plaintiff is made bailiff, and then judgment is given for him ; that judgment is not erroneous, because it is given by the court, and not by him alone ; for there the action is originally well brought, and the plaintiff was not bailiff at the time of the action brought. But besides, I do not take the opinion there to be the resolution of the court ; *vide* 3. *Cro.* 320. that it is not error, except it be objected to and over-ruled ; but surely that is a hard doctrine ; for it might so happen, that he had not an opportunity of pleading it below ; but my reason for that judgment is, that it did not appear on the record to be the same person. But here it does appear on the record to be the same person ; and that being so, though the action were originally well commenced, yet I take it to be error. If one of the aldermen of *London* should bring an action before the mayor and aldermen, and recover, that may be a good judgment, because it may be a court of mayor and aldermen without him ;

Master and brethren of an hospital may present a brother to a benefice, but cannot present the master.

and the plaintiff would not be an essential part of the court ; *vide* 13. *Hen.* 8. 12. 14. *Hen.* 8. 2. Master and confrery of an hospital may present one of the brothers to a benefice, but they cannot present the master, or infeoff the master : for to that purpose the brother who is presented or infeoffed is severed from the body ; and though the master have a double capacity, *viz* a natural and a political one, yet in one capacity he cannot do an act to himself in the other capacity ; but any single brother may take from the head and the remainder of the brothers, because the head and the rest of the brothers are a perfect corporation without him ; *vide* 3. *Hen.* 6. 43. but the brothers are not a corporation without the master, who is the head. And he quored *Hob.* 87. that an act of parliament against natural equity, as to make one a judge in his own cause, would be merely void.

4. Co. 13.

* [673]

Diminution not to be alledged in an inferior court.

* As to the last point, he held it a plain discontinuance, and not amendable, for diminution is not to be alledged in such an inferior court as this of the mayor is ; that judgment ought to be reversed, for the two last reasons.

WARD,

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WARD, Chief Baron. The errors assigned are three :

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FIRST, That the act of common council mentioned is contrary to the law of *England* and right reason.

SECONDLY, That the defendant ought to have been admitted to wage his law.

THIRDLY, The general error, viz. that judgment is given for the plaintiff, when it ought to be given for the defendant.

And all these three fall under five considerations :

FIRST, Whether the act of common council be good to maintain this action ?

SECONDLY, If it be, Whether it be brought in the right court ?

THIRDLY, Whether wager of law lies ?

FOURTHLY, If that does not lie, Whether judgment ought to be final and preceptory, or only a *respondeas ouster* ?

FIFTHLY, If all these points be against the plaintiff in error, Whether there appear such error on the record for which the judgment ought to be reversed ?

As to THE FIRST, The act of common council is a good ground for this action, both in reason and in the legal consideration of it ; and that has been so adjudged both in the courts of common pleas and king's bench. The subject-matter of this by-law is the power the city of *London* has for choosing sheriffs for *London* and *Middlesex*, which franchise is by royal charter granted to *London*, whereby a trust is reposed in the city that sheriffs be accordingly chosen ; and a failure therein would be such a breach of trust as would be a good cause of forfeiture of their franchise. And as this office is of great trust, so likewise is it an office of charge, which makes people unwilling to take it upon themselves ; so that there is an absolute necessity there should be a compulsive power in the city to enforce some to exercise it, for the preservation of their franchise and discharge of their trust. And this by-law is in pursuance of this compulsive power, and made by the mayor and common council, and by consequence by all the freemen, whose consent is involved in that of the common council ; and they that are intrusted to make laws for the better governing of the city are the best judges of the qualifications of persons fit to bear this office, and of the penalty they shall incur in case of refusal. And every corporation in *England* has a power to make a by-law for the better ordering and government of the corporation, as incident to their being : and he quoted the case of *Vanacre*, * in the king's bench, and a judgment upon the return of a *hab. corp.* in this very case in the common pleas.

* [574]
Ante, 269.
Salk. 142.

SECOND POINT, Whether the action be well brought in the mayor's court? The penalty by the by-law is limited to the mayor,
X x 4 commonalty,

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commonalty, and citizens of *London*, and therefore none can sue for it but the mayor, commonalty, and citizens; then it is limited and restrained to be sued in any of the king's courts of record in *London*, and there are two considerable courts of record in *London*, viz. the sheriff's court and the mayor's court; and in either of these courts, if the parties had been proper, this action might have been brought; and without doubt it might have been brought in the sheriff's court.

In the face of the record it does appear, that this action is brought by the mayor and commonalty; so it appears here is a complete body, and every corporation aggregate must sue by the name of the head and body, and the head is essentially necessary. Here the mayor is the head; and the corporation the commonalty or citizens of *London*. Then who are they that are the constituent parties of the court? And we find they are the mayor and aldermen; so we find the same men sue before the same men, that is, the mayor and commonalty sue before the mayor and aldermen, viz. the mayor sues before himself; and that is it which makes the inconsistency, which is so much the greater, that it is without necessity, for they might bring this action in the sheriff's court.

And this objection does not arise from point of interest, but from point of inconsistency, for an objection from the point of interest would be of no force; for the mayor has no greater share of the penalty to be recovered than even the party defendant has.

OBJECTION. Though the stile of the court be before the mayor and aldermen, yet they never are there, but all is done before the recorder, who may or may not be free of the city. It is like a grant of consuance of pleas to a man, though he himself be party, which is bad if there be not a judge appointed; but if another be appointed a judge, the grant is good, for the king's patents cannot enable one to be judge and party.

ANSWER. This were to take an averment against the record, whereby it appears that the court is held before the mayor and aldermen.

OBJECTION. The same thing was used to be in the king's bench, when the king sat there upon pleas of the crown, as they still may do; therefore this is no material objection.

• [675] **ANSWER.** By the constitution of *England*, though the king sit in that court, yet the judgment was given by the Judges, and not by the king, 4. *Inst.* 71. 72.; and all judgments are to be *PER CUR.* And if a criminal be to be punished by fine at the king's will, it shall be done by the Judges according to the law of *England*, and not by the king himself; and that is, because that such is the king's will; and he quoted the case of 14. *Hen.* 8. 2. *Bro. Corporat.* 34. before mentioned by *HATSELL*. If the corporation of *London* give a letter of attorney to make livery, and before

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it is made the mayor dies, and after livery is made before another mayor chosen, it is ill. *Bro. Corporat.* 63, 64. But if the mayor had been made, and then a livery, it had been well, because at the time of the livery there had been a complete corporation to all purposes; and an obligation made by the commonalty to the mayor is not good. *Bro. ib.* 4. *Inst.* 213. 12. *Co.* 114. *Ro. Judgm.* 93. that the chamberlain of *Chester* cannot determine a cause in which he himself is party; and here the mayor of *London* is the chief plaintiff and the chief judge.

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The death of the mayor causes a cessation of jurisdiction of the corporation till another mayor be chose. *Vide Dyer*, 220. where a recognizance entered into before *Sir N. B.* keeper of the great seal, acknowledging such a sum due to him and to two more; and held void as to *N. B.* but good as to the rest; and a Judge cannot take a conuſance of a fine to himself. *Ro. Judgment*, 93, 94. *Hob.* 85. *Mo.* 871. 2. *Ro. Ab.* 279, 280. 2. *Ro. Ab. title Trial.* *Styl.* 107. 130. And though many precedents be of such actions, yet they passed *sub silentio*, and therefore cannot maintain such an incongruity as here is. And the case of the bailiff of *Newcastle*, *Ro.* 89. which is most like this, yet it differs from it in this, that there it does not appear on record that the same person was judge, as here it does.

THIRDLY, As to the wager of law, it lies not here; though, generally speaking, where the debt is not grounded upon any specialty, or matter favouring of the realty, it will lie. And he quoted the case in 1. *Vent.* 261. in point, and 2. *Lev.* 106. the same case; but it lies in debt upon assignment of commissioners of bankrupt: 2. *Cro. Bradshaw's Case*, because the act of the commission out of chancery, nor the deed of assignment, do not alter the nature of the original debt, but only transfer it as it is; and therefore if the debtor could have waged his law against the bankrupt, he shall still do it against the assignee. If a debt arises upon a by-law authorized by letters patent, wager of law will not lie in debt for it. And the office of sheriffs of * *London* and *Middlesex* is granted to the city by the charter of *King John*; and a power of making by-laws to enforce the exercise of that office is necessarily and incidently granted by the same letters patent; so this by-law now in question is in some respect grounded upon letters patent. And my *Lord Coke* says, that wager of law is grounded upon the law of God, which says, that if one leaves an ox in the custody of another, and the ox dies, or is lost, that the bailor should take the bailor's oath of such death or loss to discharge him.

* [676]

And per *WARD*, There is such a multifariousness of facts in the foundation of this action, that it were very unsafe for a man to wage his law in it, and very inconvenient to admit him to; and Judges are to use a sort of discretion in admitting people to wage law, *vide* 5. *Hen.* 4.

FOURTHLY,

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¶ [679]

ANON, 1798:
Plaintiff, on
bringing convey-
ment proof, and
averring *Magna
Charta*, may
compel defend-
ant to wage his
law.

self, but one which the plaintiff had when he had no witness of his debt, to put the defendant under a necessity of giving him his oath to discharge him; so it was a kind of an equity in law, that the plaintiff might put him to take his oath that he owed nothing to him, or confess the debt, rather than the plaintiff should lose his debt in cases where he had no witnesses of it at all, or had some who were then dead. *Magna Charta*, c. 28. makes this very manifest; the words are, "*Nullus ballivus de cetero ponat aliquem ad legem manifestam, nec ad juramentum simplici laquei suo, sine testibus fidelibus ad hoc inductis;*" where note the words "*de cetero*", which shew that before that time the law was, that if a man had brought an action against another without any witness, he might put the defendant to his oath, whether he owed nor the debt, and that was thought hard; and to prevent it this statute was made; but the witnesses mentioned by the statute are not to be produced after issue joined, or to be cross-examined, but only to give proof of a probable cause of action; that is, such proof as we now require of a *modus decimandi*, when we grant a prohibition to stay a suit for tithes in *specie*. And upon bringing such convenient proof by credible witnesses, and averring the statute of *Magna Charta*, a plaintiff may at this day compel a defendant to wage his law. In 33. H. 6. 8. in a *præcipe quod reddat*, the tenant made default, but appeared on the return of the great *capias*, and pleaded non-summons, and would conclude to the country, where the proper trial was, by wager of law of non-summons; and the question there was, If he could waive his plea of wager of law, and betake himself to plea concluding to the country? and the better opinion there is, that he could not put himself upon his country, and decline his wager of law. And that case is plainly out of the statute of *Magna Charta*, because it is not debt, nor *simplex laquei*, but a process of non-summons from which he was to save himself; therefore since this action is grounded upon the defendant's tort, it would be hard to put the defendant to wage his law; for it were too great a temptation to save the penalty of four hundred pounds, and the law of *England* does abhor people's swearing, when they are charged with a crime or offence. Indeed when the Popish clergy did prevail, they did introduce an oath *ex officio* to make people swear when they were charged with a crime of ecclesiastical consuance; but that practice was always looked upon as an incroachment upon the right of the people. *Vide* 12. Co. 26. and other authorities mentioned there.

Secrecy is the
reason of wag-
ing law, and
therefore cannot
be in respect of
a by-law, which
is notorious.

Another principal reason why a wager of law will not lie in this case is, because the act of common council, by which this duty is created, is notorious and publick; it is the law of the city of *London*; of which every body within the city must take notice; and the secrecy of the contract which raises the debt, is the reason of the wager of law; but if the debt arise from a contract that is notorious, there shall be no wager of law; and so is the reason of the diversity between these two cases, of an action of account brought

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brought against a receiver; for if it be against him as receiver, by the hands of the plaintiff, a wager of law will lie; but if he be charged for money received by the hands of a third person, no wager of law shall be allowed; because it appears from the nature of the action that a third person can prove the receipt; and the action in our case is brought upon the act of common council, and other publick transactions, which are publickly known; *ergo a fortiori* wager of law is not receivable. * But if in detinue the bailment be by another hand than the plaintiff's, yet the defendant shall wage his law: and the reason of the diversity is, that in a declaration in detinue the bailment is no necessary ingredient, and the plaintiff by alledging an unnecessary thing shall not bar the defendant from the benefit of waging his law. For if in detinue the defendant should plead *nihil detinet*, and put himself upon the country, and upon the trial it appeared that the defendant found the goods, instead of having them by the bailment of a third person, yet the plaintiff shall recover; so the *gist* of the action is not the delivery of the goods, but the detainer is the only material part of the action; and the whole point is, whether he detained the goods; and that is a matter of secrecy.

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Wager of law
will lie in ac-
count by receiv-
er for money re-
ceived by the
plaintiff, but not
by a third per-
son.

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And he quoted 1. *Inst.* 295. that wager of law lies in debt upon an award, if the submission be by parol; which was urged to be grounded upon a notorious transaction, and by the interposition of strangers. But *PER LUY*, The award is not the ground of the action there, but the submission, which may be in private; for an award without a submission would be void, and therefore the submission is the ground-work, and what raises the duty: but the principal case here is not like any case in our Books, where a wager of law is allowed. As to the *Case of the Corporation of Glaziers*, which is relied on as a parallel case, admit that case to be law, (as I shall demonstrate it is not by and by) it is nothing like this case: for the company of glaziers brought an action upon a by-law made by them, to which the defendant pleaded *nihil debet*, and put himself upon his law, and so had day given him to wage his law; so it never came before the Court judicially to determine: but if that were law, there would be a vast difference between that case and this; for a by-law by a whole city, or other town corporate, is what all people that live or come within such city or town are bound to take notice of, without any more a-do; but a law made by a particular fraternity, or company within a city or town, none but the members of the same are bound to take notice of. 1. *Bulst.* 11. And surely a by-law by the company of glaziers in London, which only binds their own members, and is only for the better government of that private society, is not to be compared to a by-law by the common council of London, or by any other corporation of a publick concern. In the eighteenth year of *Charles the Second*, upon the act of common council for restraining the number of carts in the city, * and * an action brought for the penalty for breach of that law, the great objection was, that the party had not notice of the law, he being

The reason why
wager of law lies
on award, if
submission be by
parol, is, that
the submission is
the ground of
the action.

Vide Sav. 94.

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*Heit doubted
whether wager
of law would lie
on debt on a
judgment for
americiament in
a court-baron*

being no member of the corporation; yet it being a law of the city, it was ruled, that every one that came into the city was bound to take notice of it: and this case differs therefore from all the reasons and authorities quoted concerning wagers of law. Then as to the case of americiament in a court-baron, where it is said, that in debt upon a judgment in such a court, wager of law will lie; which my brother HATSELL allows to be law, and alledges for reason of it, that they are matters of small and private concern, but only for a trifling sum of forty shillings, and the americiament is only for small things, for the benefit of the lord, and not worth giving the country trouble to come to try them. But I must own I am not satisfied, that a wager of law will lie in that case, for two reasons, one which concerns the plaintiff, and the other the defendant; for the plaintiff, now after the recovery, he has sufficient proof to make out his cause of action; and now it ceases to be a matter of secrecy, being grounded upon a judicial proceeding of a court at law, and why then should he be put to lose his debt by a wager of law of the defendant; for now it is not matter of that secrecy that requires a wager of law. And the defendant now has a judgment against him, suppose upon the oath of witnesses; and he might have waged his law in the original suit below, and that he omitted to do, but let judgment go by default, or otherwise; and shall he now by his oath be admitted to falsify that judgment of a court that had jurisdiction? Surely he shall not, nor is there any reason for it.

*In account a-
gainst bailiff of
a manor, wager
of law will not
lie.*

In many cases, where there are no deeds or specialty, no wager of law will lie. In account upon receipt by the hands of a third person it will not lie; or if it be brought against the bailiff of a manor it shall not lie; because, says the Book, that is in the realty; and what is that to say? It is, because it is notorious to the country; because the country takes notice of his looking after the manor, and they have thereby an opportunity of knowing that he has received his rents, &c. So in debt upon a contract for a sum in gross, wager of law will lie; but if debt be brought for rent due upon a parol lease, it will not lie; and the reason is, because it is in the realty, and arises from the taking the profits of the land, and occupation of it in the country; and so the notoriety of the thing excludes the defendant from waging his law; and it is ridiculous to say, * that wager of law will lie in debt upon a judgment in a court-baron, because the money might be paid in private; for that would be a reason to wage law in all the cases before put; but it is to be considered that it is not the privacy of the payment, or the possibility thereof, that is the occasion of a wager of law, but that the ground of the action is secret; as if debt be brought upon a bond, with condition for the payment of money, the money may be paid privately, and thereby the bond is discharged, if payment could be proved; and yet in debt upon such bond wager of law will not lie, because the contract was by specialty; though the bond may be discharged by payment, and that the

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the payment might be private; so it is plain the possibility of private payment will not intitle one to a wager of law. And the reason is the same here, for the duty arises upon a solemn act made by the city assembled in their legislative capacity, and that is very notorious; and what then can intitle him to wage his law, but the possibility of payment in private; yet if the foundation of the action be publick and notorious, that shall never do it. There was a case in the king's bench, 29. Car. 2. Rot. 92. where it was held, that if debt be brought upon a recovery in a court-baron, the defendant may wage his law. And that is the only case of any such judgment or authority that I meet with in the Books; except it be the opinion of 49. Ed. 3. 3. which I value very little; the case was debt upon account stated before auditors, upon which it appeared that money was due to the plaintiff; there it is said, that in case money be recovered in a court-baron, and debt be brought upon that judgment, the defendant may wage his law: But who says this? Not the Court, but the Counsel at the Bar; and if you consider all that the Counsel said, you will no more take it to be law than to be gospel; for they say, that for debt upon a recovery in a court-baron, or in a franchise, a wager of law would lie; and what is meant by franchise is commonly a court of record; for if the king by letters patent grant a franchise to hold a court within such a precinct, it will be intended a court of record; for the king cannot grant a franchise to hold a court-baron in gross. And in truth in that case the whole Court were under a great mistake; for it being debt upon account stated before auditors, wager of law is therein taken away by the statute of *Westminster the Second*, c. 11. whereby auditors have power to fine and imprison, which necessarily makes them a court of record; and therefore no wager * of law can be in debt upon such judgment; and by consequence no stress to be laid upon the authority of that book. But 34. Hen. 6. 49. Br. *Ley Gager*, 11. is of great authority; if debt be recovered in a court of antient demesne, and an action be brought upon that recovery, no wager of law will lie against it; yet a court of antient demesne is no more a court of record than a court-baron is; and no difference in this respect can be made between the two courts. And therefore if wager of law does not lie in one, as the authority of that case is full that it does not, none will lie in the other.

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a Inst. 380.
Sav. 115. cont.
Vide Sav. 83.
that ecclesiastical commissioners may fine and imprison; yet that they are not a court of record.
Ante, 388.

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Court of antient demesne no court of record.

There are two cases mentioned in *Pincheon's Case* (a), concerning wagers of law, and the reason thereof. FIRST, If one retain a painter, or other workman to serve him, who after brings debt for his wages, the master shall wage his law; but if it be a retainer upon the statute of Labourers, he shall not wage his law; and the reason given by the Book is, because in the case of the statute he is compellable to serve: but surely that can be no reason, for though he be bound to serve, the other is not bound

(a) 9. Co. 88.

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to take him; but the reason is, because it is hard the master should be put to wage his law, but rather that the plaintiff should be put to prove his retainer by the statute. Another case is 28. H. 6. 4. b. One was a prisoner in the *Tower* for high treason, and the lieutenant finds him meat and drink, and for this brings debt, and the defendant was denied his law; and *Co.* in his 9. *Rep. ubi supra*, gives for reason, that the lieutenant was bound to find his prisoner with meat and drink; but that is not law, for the gaoler is not bound so to do; *vide Pl.* 68. a. And it is for the benefit of the prisoner that he shall not be put upon it, for the other must make out his charge, and not put the defendant to his oath. And another reason why he shall not wage his law is, because, while the prisoner is in his charge, the gaoler cannot take any security for his victuals from himself; for a bond from him in that case would be *ipso facto* void; and *ergo*, since he is disabled from taking a security from the prisoner, but barely his promise, it were hard to allow the prisoner to clear himself by his oath. Another reason why wager of law should not be allowed here is, that every by-law is grounded upon charter or prescription; if it be matter of record, it leaves no room for a wager of law; and if it be by prescription, it is time out of mind, and no man living can swear that off, or deny a prescription upon oath. It is true, a prescription is capable of proof, by shewing a usage of such a thing by * antient witnesses, which is an evidence only of a prescription. 1. *Vent.* 261. Wager of law was denied in debt for scavage arising by prescription. And lastly, a wager of law will not lie here, because this act of common council does not affect the defendant only, but all the whole body of the city; and there is no case, where there is a penalty, to which all the men within such a jurisdiction, precinct, or city, are obnoxious, that a wager of law was allowed; and this answers all your cases of recoveries and amerciaments in courts; for there none is affected but one; but this law is made to extend to the whole community of the city for all generations to come, and for aught I know to the day of judgment. Now as to the *Case of the Company of Glaziers* before put, it is true, so far as it was a debt for the recovery of a penalty inflicted by a by-law, it is like this case, and a precedent for it: But how happened that matter? **FIRST**, It was allowed by Counsel on both sides, and the Court never heard of it but once upon a motion, and admission of the Counsel of both sides; so it was a gudgeon swallowed, and so it passed without observation. And the case in *Co. Ent.* 118. is very like this: Debt was brought for a fine set upon the defendant by the homage at the court-baron, grounded upon a custom to make laws for regulating their common, and inflicting a penalty on such as did inclose at inconvenient times; and a wager of law was offered there, and judgment is there for the defendant; for of common right the homage has no right to impose a penalty for such private offences, but it is only by custom that they can do it; *vide 5. Co. Chamberlain of London's Case. Mo.* 270. 1. *Leon.* 203.

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The case indeed is not well reported, but upon comparing both the Books together, it appears the wzger of law was not admitted in that case.

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THE SECOND POINT considerable is, Whether here be a discontinuance? And surely it is, for it appears that the defendant came into court, and appeared to a plaint levied against him the 15th of November, and his bail was given to appear at the next court, which was held the day following. viz. the sixteenth, but there is no day given to him on record, or to the plaintiff, to appear on the sixteenth; but presently after bail taken, there is day given to the 20th of June, and every case ought to be continued from court to court, as in *Westminster Hall* from Term to Term, if it be not a real action, where long process is allowed. *Vide* 21. Hen. 7. 16. Discontinuance is error by the common law; but by the 32. Hen. 8. c. —. it would be cured, if it were after verdict; but this is upon demurrer. So the next thing considerable is, Whether this be amendable? And surely it is not; for it is such a misprision as is not amendable by 14. Ed. 3. c. 6. or 8. H. 6. c. 12. for these statutes do not extend to amend any record but in errors, which are the misprision of clerks in making their entries on record; but a discontinuance is a fault of the Court, and that never was amended by any of these statutes; and many judgments have been reversed for it, as in 2. Cro. 211. If a Court once give a judgment they cannot after amend, 3. Cro. 412. *Ireland's Case*, *Yel.* 169. 2. Cro. 260. 3. Cro. 619. And if a discontinuance were amendable by any of these statutes, there had been no need of the statute of 32. Hen. 8. —. that supplies the want of continuance after verdict. But if the record below be well, why may not we amend by that? And though the court below be not of as high a nature as the courts of *Westminster-Hall*, the grand sessions of *Wales*, or the county palatine, yet if the record below had been originally well, and this fault had been only a slip in the clerk in transcribing, we ought to amend it, by the statute of 8. Hen. 6. for the record being well below, the omission was in the clerk; and though the very record be that which we have here, yet if it had appeared to us to have been well below, we ought to have amended by it. In the king's bench, in error of a judgment of an inferior court upon the record certified it appeared there were but eleven jurors, which was the fatal error; but the book of the inferior court, where the names of the jurors were entered, was produced, and oath being made that the twelve there entered were sworn of the jury, the record was amended by that book; but here we find that the record was originally bad below, and amended below as soon as the exception was taken here. And in every day's practice, if the record entered on the roll be ill, yet if the paper-book in the office be well, we give them leave to amend by the book in the office; but if the paper-book be originally ill, and clandestinely amended, there we never let them amend their record by it.

If case in city-courts be not continued, it is a discontinuance, and not amendable.

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Objection. You will give credit to our record, as if it were in *Westminster-Hall*, if the roll be amended by the court of common pleas or king's bench, when error is in the chequer chamber. *Answer.* Those courts will amend nothing but what is amendable by law, at least it must be presumed they will not do it; besides, when in those courts they amend the matter below, they come into the king's * bench and alledge diminution, and thereupon the record is certified up, and then the Court above can never tell whether they have amended or not; if they certify it up upon diminution alledged, it will do well enough, and we shall not suppose they have done amiss. But no *certiorari* lies to this court of the mayor, and that is the case of *Green v. Cole* in 2. Saund. 252. 1. Lev. 310.

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No *certiorari* lies to the mayor's court.

THE THIRD GREAT POINT is the manner of bringing of this action, to which there were two exceptions taken: the first is to the by-law, that it inflicts a penalty for the benefit of those that make the law. But that point has been already settled, and the by-law notwithstanding adjudged good; and the truth is, that objection has not weight enough to require an elaborate answer; for we must consider the city of *London*, as all other great towns are to be considered, a great community that have a legislative power intrusted to them for their better government, and can make laws to bind the property of those that live within that city or precinct, and also of all strangers whatsoever that come within the limits of their jurisdiction; and it was necessary and convenient they should have such power for the support of their government; and it is so in all countries and forms of government whatever, whether monarchy, aristocracy, or democracy, or whatever order of government it be; for the supreme jurisdiction cannot have leisure to inspect into the small matters that concern the whole order and regulation of matters within that society or community, as they that are members of it shall. *Vide Beaulieu de Rep. c. 2. Hob. 221.* says that all corporations, as such, have power to make laws and ordinances, and need not special words in their patents to enable them thereunto. And if they have power to make laws, of necessary consequence they must have a power to inflict a penalty for the enforcing of that law; and here in *England* it must be a pecuniary one, for a corporal one it cannot be by the law of *England*, it being against *Magna Charta*, without a special custom. And this pecuniary penalty must be levied by distress, or action of debt; for there can be no other remedy. And surely it can be no exception, that this penalty goes to the use of the body politick, for it is most reasonable it should be so; for it is in the nature of damage for an injury done, and that injury is done to the body politick, whose laws are broke and despised, and therefore it is fit they should have the penalty; and to say that one who is free of the corporation should not be judge, because * he is to have share of the penalty, is as ridiculous as groundless: and since this objection has had so little regard with us in the king's

Bolia.
All corporations, as such, have power to make by-laws.

Penalty of by-laws may go to the corporation.

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king's bench, I wonder it should be so much insisted on now, especially since it has been also rejected in the common pleas. I agree, where the city of *London* claims any freedom or franchise to itself, there none of *London* shall be judge or jury, for there they claim an interest to themselves against the rest of mankind; but here is only an act of government to exercise a power which they have by law. And it is not to be imagined that the aldermen of the city, in kindness to the body politick, would oppress the rest; and the freemen, who should try the fact, would be themselves obnoxious to the like penalty in time, and in their turns; and if there were any room for a presumption, it would be that they would favour private persons against the body politick, in regard of their own private interests, which would be concerned next time.

Where corporation claims a franchise, shall not be judge or jury in dispute about it.

But THE TRUE GREAT POINT is, that the court is held before the mayor and aldermen, and the action brought in the names of the mayor and commonalty; and that very man, who is head of the city, and without whom the city has no ability or capacity to sue, is the very person before whom the action is brought; and this cannot be by the rules of any law whatever, for it is against all laws that the same person should be party and judge in the same cause, for it is manifest contradiction; for the party is he that is to complain to the judge, and the judge is to hear the party; the party endeavours to have his will, the judge determines against the will of the party, and has authority to enforce him to obey his sentence: and can any man act against his own will, or enforce himself to obey? The judge is agent, the party is patient, and the same person cannot be both agent and patient in the same thing; but it is the same thing to say that the same man may be patient and agent in the same thing, as to say that he may be judge and party; and it is manifest contradiction. And what my Lord *Coke* says in *Dr. Bonham's Case* in his 8. Co. is far from any extravagancy, for it is a very reasonable and true saying, That if an act of parliament should ordain that the same person should be party and judge, or, which is the same thing, judge in his own cause, it would be a void act of parliament; for it is impossible that one should be judge and party, for the judge is to determine between party and party, or between the government and the party; and an act of parliament can do no wrong, though it may do several things that look pretty odd; for it may discharge one from his allegiance to the government he lives under, and restore him to the state of nature; but it cannot make one that lives under a government judge and party. An act of parliament may not make adultery lawful, that is, it cannot make it lawful for *A.* to lie with the wife of *B.* but it may make the wife of *A.* to be the wife of *B.* and dissolve her marriage with *A.*

Litt. §. 212.

1. Inst. 141.

Hob. 87.

Person cannot be both party and judge.

Vide 3. Inst. 38.

Steward, Comptroller, &c. of

king's household,

shall try one for

conspiring his

own death.

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Objection. My Lord Mayor, as he is head of the corporation, acts in his politick capacity, and judges in his natural capacity.

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It is true he acts in different capacities, yet the person is the same, and the difference of the capacities in which he acts, does not make a difference; as the Bishop of London has two capacities, one as Bishop, the other as *J. S.* but he cannot do an act in one capacity to inure to him in another capacity; as he cannot make a lease for years as he is bishop, to himself as he is *J. S.* nor *vice versa*.

Objection. It is an invisible body politick. It is true, but the head is visible as the bishop is, and he is the most conspicuous part of the corporation, and that without which there would not be a corporation existing; and it is impossible to get over the two judgments in *Henry the Eighth's* time, before cited by my Brothers: The master and confrery of the hospital had the presentation to a rectory; they under their common seal present their master, without taking notice that he was their master, and it was held to be a void presentation, and that judgment was after affirmed upon writ of error; and in that case the difference is taken between presenting one of the members, and presenting the master; for if they had presented one of the members, it had been well; for if that member were set aside, yet still it would be a corporation. And when they present a member, it is a setting aside, or an exclusion of him for that purpose from the corporation; but if the master, who is the head, be set aside, then it ceases to be a corporation, and by consequence cannot do any corporate act, and then their presentation is void; so if this court could be before the aldermen without the mayor, then this action might be well brought; but as, if the Chief Justice of common pleas bring an action in the common pleas, as it is his privilege to do, yet there he must not be named in the whole proceedings but as plaintiff, and not so much as the *placita* shall be said to be before him, for then it would be error; and the *placita* shall be *coram Ed. Nevill, Joanne Powel, & Joanne Blincowe*; and if he take out the writ, it must be not* so much as tested in his own name, but in the name of the next senior Judge: so here, since the court cannot be held without a mayor, this action which is brought in his name cannot be brought in that court, and the lord mayor is a necessary constituent part of the city; *vide* 21. *Edw.* 4. 15. 151. 17. *Edw.* 3. 48. A burghers of a corporation had laid out money for the use of the corporation, and after being mayor, took the bond of the corporation for it to him in his natural capacity, and held void. And he allowed the case in 2. *Re. Ab.* —. before cited, to be good law, but utterly exploded the reason given there: the case was, A member of a corporation brings an action in the mayor's court, and after the plaintiff was chosen mayor, and then judgment for him, and a writ of error brought, and the judgment affirmed; because, says the book, the judgment was not given by him alone, but by the court; but if he be in the stile of the court, he is a judge of the court, and it cannot be a court without him. And though my LORD ROLL

was

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was a very learned man, and that his Abridgment was published by my LORD HALE, perhaps the greatest man of the law that ever was, yet this reason might be overlooked by him; however, it is plain this reason is a senseless one, but the true reason is to be seen in 2. Hen. 4. 40. If *A.* sue in the court of mayor and bailiffs, *A.* is made mayor, and it is not said in the record that he was made mayor, or it do not appear in the record that he was made mayor, there if the defendant do not come to the court below, and plead this error in fact, he shall never after assign it for error; but if he had pleaded this error in fact, and had been overruled in it, he might have a writ of error; for one shall never take advantage of an error in fact, where he had an opportunity of pleading it; that is, if it be such an error in fact as does abate the writ; and if it be such an error in fact as does happen after the time of pleading is out, then the way is to bring an *audita querela*; as if after verdict between the day of *nisi prius* the plaintiff release to the defendant, he cannot plead it in bank, but must have recourse to an *audita querela*; and if this exception had been taken upon the *habeas corpus* in *Westminster-Hall*, it would not have hindered a *procedendo*, because it was an error in the proceedings. And the *habeas corpus* is only to know the cause of detainer of the party in custody, and what is then to be judged of is only the return of the by-law; and if that * be good, we must remand, for to enter into an examination of the proceedings would be to preclude the plaintiff before his time.

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Objection. Though the mayor be named in the plea, yet the recorder is judge, and that we must take notice of as judges by commission here in the city; where we are as much bound to take notice of the customs of the city and its courts, as we should take of the customs of the courts of *Westminster-Hall* when we sit there. *Answer.* The *placita* are virtually held before the mayor and aldermen, though in fact the recorder acts, and is as a deputy; and the steward of a court who has a deputy cannot sue in the court before his deputy; and a deputy acts, and of right ought to act, in the name of his principal,

The court is held before the mayor and aldermen, though the recorder acts as deputy.

Et per omnes jud. reversionetur,

A
T A B L E
OF
P R I N C I P A L M A T T E R S
CONTAINED IN THE
T W E L F T H V O L U M E.

A.

ABATEMENT OF ACTIONS AND WRITS.

1. **MISNOMER** may be pleaded in abatement without a *venue*; for as it concerns the person, it must be tried where the action is brought, *Williams v. Drury*, Page 195
2. If a defendant defend "*vim et injuriam*," he cannot after plead misnomer, or to the jurisdiction, *Clark v. Butler*, 235
3. Misnomer should not be pleaded by attorney; but if such plea by attorney be received, it will not be cause of demurrer, *Aimer v. Wicket*, 273
4. Trespass for battery of servant, plea, that did not appear he was so when battery committed, and *petit judicium de billa*, such plea ought not to be received, and *respondas ouster*, *Rosiere v. Hawkins*, 399
5. Coverture may be pleaded in abatement generally without a *venue*; *aliter* if in bar, *Vezey v. Smith*, 503

6. If rules of pleading are not out, may plead in abatement in a subsequent Term, *Anonymous*, 504
7. See also *Anonymous*, 522

ABATEMENT OF NUISANCE.
See NUISANCE.

ACCEPTANCE.
See TENDER and REFUSAL.

ACCOUNT.
See MERCHANT.

1. If *A.* give a note to *B.* to receive money from *C.* and *C.* discharges *B.* of a debt he owed him, account lies against *B.* *Anonymous*, 509
2. On general bailment of goods account alone lies; *aliter*, if on a special promise, case will lie, *Sparroway v. Rogers*, 517

ACTIONS IN GENERAL.
See VIENE.

1. Suit commenced by *latitas* for a false return of a Member of Parliament is a good

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- a good commencement of the suit within the year; *per* three Judges against *Holt, Culliford v. Blankford*, 26
2. Action on a tort and on a contract cannot be joined, *Dalston v. Eynston*, 73
3. But it is now settled, that an action against a common carrier on the custom of the realm, and an action of trover, may be joined in the same declaration, *Dalston v. Eynston*, 73 *notis*
4. Local action must be brought where fact arose, unless by consent, *Anonymous*, 399
5. Action for false return is local, but may be laid either where the return was, or where it is of record, *Lord v. Francis*, 408
6. Action for a false return to a *mandamus* may be brought either where the false return was, or where it appears of record, at the plaintiff's election; and being a local one, must be brought in one or other, *Anonymous*, 515
7. Transitory actions defendant may transfer to the right county, unless plaintiff will be bound by rule to give material evidence where the action is laid, *ibid.*
8. After recovery of damages in assault and battery, no action will lie for consequential damages; for when damages are recovered it is according to the damage sustained, and to be for entire satisfaction, *Fitter v. Feal*, 542, 543
- ### ACTIONS ON THE CASE.
1. *Per Holt, Chief Justice.* Of late it is held that case will lie for prosecution in inferior court, which has no jurisdiction, *Temp's v. Killingworth*, 4
2. Case lies against postmaster for not delivering a letter on request, though no particular damage accrued; but if the letter had been tendered, and the plaintiff would not first pay postage, he is not bound to deliver it, *Edwards v. Dickinson*, 6
3. *Pro opere et labore*, not saying what, good, *Lilbord v. Coulthorp*, 50
4. Case will lie by an executor for a false return to a *ferri facias* taken out in the testator's time, *Williams v. Act*, 71
5. Case lies for negligently keeping his fire, by lessee against his under lessee, because answerable over, *Hicks v. Dowling*, 100
6. Case for negligently keeping his fire in a field lies as well as in a house, *Tuberville v. Stamp*, 151, 152
7. Case for maliciously causing him to be indicted of a riot, of which he was acquitted by verdict, *Sawill v. Robert*, 208
8. Case for stopping his lights, not saying it was an ancient house, good after verdict, had been ill on demurrer, *Roswell v. Prior*, 215
9. Disceit will lie against a man who sells goods, knowing they are not his own, if recovered against the vendee, *Turner v. Erent*, 245
10. Case will not lie for arresting one without cause of action, unless he be held to excessive bail, *Neale v. Spencer*, 257
11. Case for holding him to special bail without cause, should shew for how much was arrested, else ill, *Robins v. Robins*, 273
12. Case for false return to a *mandamus*, need not alledge it belonged to them to do it, for by making a return admit it, *Anonymous*, 322
13. Case for keeping a dog *valde ferocem*, that bit the plaintiff, not saying *sciens*, ill, *Mason v. Keling*, 332
14. Two cannot bring joint action for false return to a *mandamus*, *Butler v. Rew*, 349-371
15. Case by master of a ship against a person who distrained corn, with which the ship was freighted, whereby he lost his voyage, will lie; or he may have trespass, and declare on his possession, *Mikes v. Caly*, 381, 382
16. Action for false return is local, but may be either where the return was, or where it is of record, *Lord v. Francis*, 403
17. Case

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17. Case lies against THE POSTMASTER GENERAL for loss of bill delivered at the Office, and lost there, *Lane v. Cotton*, 472, 473
18. The Postmaster General is not personally liable for the value of a bank note stolen by one of the Sorters of the Post Office out of a letter delivered into the Office, *Whitfield v. Lord Despencer*, 472 *notis*
19. Where a person takes upon himself an office for the public benefit, he is liable for it, *Lane v. Cotton*, 479, 480
20. Inn-keeper is only liable for the goods of a guest, *Lane v. Cotton*, 480
21. Action lay against carrier before the law gave him remedy against the hundred, *Lane v. Cotton*, 482, 483
22. Action lies against a smith for refusing to shoe a horse, *Lane v. Cotton*, 484
23. So against a carrier for not carrying goods, if he be not loaded, *ibid.*
24. Against a sheriff for refusing a writ, *Lane v. Cotton*, 485
25. Case will lie against sheriff for not returning good issues on a *distringas*, *Anonymous*, 494
26. In case for malicious prosecution for felony, the declaration must agree with the indictment, *Anonymous*, 555
27. Defendant must prove a felony committed, and also probable cause of suspicion, *Anonymous*, 555
28. See also cases cited, 555 *notis*
29. Case on the *Habeas Corpus* for not giving a copy of the commitment within six hours, *Paulbil v. Powell*, 606
3. *Assumpsit* by a man against a woman, that in consideration he promised to marry her she promised to marry him, lies, *Harrison v. Cage*, 214
4. But if the man is unable to perform it by reason of consanguinity, &c. she may discharge herself of it by giving it in evidence on *non assumpsit*, *ibid.*
5. *Assumpsit* in consideration that A. would deliver goods to C. he B. would see him paid, held a good *assumpsit*; but if such promise made after the delivery of the goods *aliter*, *Austen v. Baker*, 250
6. General *indebitatus* for money won at play will not lie, for it is no more than *nudum pactum*; there must be special mutual promises, *Walker v. Walker*, 258
7. On *indebitatus assumpsit* it is no plea, that had committed an act of bankruptcy, *Harvey v. Williams*, 267
8. On special *assumpsit* for money won at play, shall be special bail, *Carrell v. Cockram*, 295
9. *Indebitatus* for goods, not saying sold, well, *Mosby's case*, 308
10. *Indebitatus assumpsit* by assignee of commissioners of bankruptcy for goods sold after bankruptcy committed; and per Holt, a general *indebitatus* lies, *Huffey v. Fidall*, 324
11. *Indebitatus* will not lie for money received on an usurious contract, *ibid.*
12. *Indebitatus* lies for rent received from a person's tenants, under pretence of title, *ibid.*
13. Bond is a discharge of *assumpsit*, *King v. Woolaston*, 406
14. Statute of Limitations no good plea on *indebitatus assumpsit*, on promise to pay on demand; *aliter* if it had been for a collateral thing, *Collins v. Benning*, 444
15. In *indebitatus* if a count be for money received to defendant's use, it is ill, *Palmer's Case*, 495
16. *Assumpsit* will not lie where a contract is varied, but a *quantum meruit*, *Anonymous*, 509
17. In-

ACTIONS ON THE CASE ON ASSUMPSIT.

1. *Assumpsit* for money due not good, unless shews a contract, or for what, *Potter v. James*, 16
2. General *indebitatus assumpsit* will not lie for money won at play, though it will against the person who holds the stakes, *Walker v. Walker*, 69

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17. *Indebitatus* for money received to defendant's use, held well after verdict, *Palmer v. Starvelly*, 510

18. In debt a promise is never laid, but in *assumpsit* the cause of the promise must be expressly shewn; for it might be on a specialty, or for rent where *assumpsit* will not lie, *Palmer v. Starvelly*, 511

19. Case lies on special promise to account, but on a general bailment of goods account alone lies, *Spurraway v. Rogers*, 517

20. *Indebitatus assumpsit* by an under-officer for pay received by superior officer, *Key v. Gordon*, 521

21. To *indebitatus assumpsit* plea of account not good, *May v. King*, 537

22. Promise before broke may be discharged by parol, but after cannot be discharged without deed or satisfaction, *May v. King*, 538

See BILLS OF EXCHANGE and QUANTUM MERUIT.

ACTIONS FOR WORDS.

See WORDS.

ACTIONS POPULAR.

1. All popular actions on statutes made before 21. Jac. 1. must be in the county where the fact was done: *Per ten Judges, King v. Gall*, 228

2. In all actions on penal statutes common bail suffices, *Anonymous*, 231

ADDITIONS.

See INDICTMENTS.

1. On case by bill defendant pleaded a wrong addition; *respondens onfter*, for statute of Additions extends only to process on which there is outlawry, and that is not on suit by bill, *Margin v. Gell*, 211

2. A mathematical master is a gentleman by his profession, *White v. Mallony*, 249

ADMINISTRATIONS, &c.

1. Bankruptcy of an executor no cause for granting administration; *aliter* if there be a natural disability, *Hill v. Mills*, 9

2. May be granted to the wife, or next a-kin to the intestate, at the election of the ordinary; and as to creditors, the ordinary may divide the administration among them, *Anonymous*, 16

3. Administration pleaded to be granted by *A. istius loci ordinarius legitime constitutus cui administratio de jure pertinet*, good, without saying *tunc et quomodo constitutus*, *Trustlock v. Harisfield*, 100

4. Bill of exchange is no more than a simple contract, and therefore assen only where the debtor is, and administration to be accordingly, *Yonnes v. Bradshaw*, 107

5. Administration granted during the minority of an executor ceases at his age of seventeen; but granted during the minority of one who is entitled to administration, does not cease till the age of twenty-one, *Atkinson v. Cornish*, 194

6. Spiritual court cannot refuse granting *probatus* of a writ to an executor because indigent or insolvent, nor compel him to give security, *Rex v. Rains*, 205

7. If a *feme covert*, being executrix and legatee, dies, administration *de bonis non* ought to be committed to the husband; if she be no legatee, and others are, it ought to be to them; if there are no legatees, to the next of kin of the first testator, *Rickardson v. Scirr*, 305

8. If a person who has two houses in different dioceses dies in one, that entitles the ordinary to grant administration, if he has not *bona notabilia*, *Aliard v. Cox*, 385

9. Where there is executor under age, if there be residuary legatee, administration *durante minoritate* ought to be committed to him, and not to the next a-kin of the intestate, *Dubois v. Trad*, 437, 438

10. Where

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10. Where directions of the statute are pursued, administration cannot be repealed; *aliter* where not, *Dubois v. Grant*, 437

11. Administration committed to one *durante minoritate* of an executor, whether on his dying under age it may be repealed, and granted to the residuary legatee, or whether the ordinary has not executed his authority? *Dubois v. Grant*, 436

12. Debt as administrator, not saying by whom committed, cured by pleading in chief, *Gidley v. Williams*, 443

13. Administration *durante minoritate* of executor determines at seventeen, of one intitled to administration at twenty-one, *Reck v. Thomas*, 500

14. Debt by administrator, *cui administratio debito modo commissa fuit*, is ill on demurrer, but cured by pleading over, *Hall v. Bond*, 537

15. Administration to be granted to the grandmother preferable to the niece, 615

16. Proximity of degrees must be according to the common law, *Blackborough v. Davis*, 616

17. If administration be granted to a wrong person by a rightful jurisdiction, must be avoided by appeal, *ibid.*

18. If granted by one who has no jurisdiction is void, and trover will lie, *Blackborough v. Davis*, 617

19. Husband to have administration to wife, 618

20. Wife and father in equal degree as to administration, *ibid.*

21. Residuary legatee preferable to next of kin, 619

22. Aunt not nearer than grandmother, who being in the right line is to be preferred, *ibid.*

23. Administration is to be committed to father and mother preferable to brother and sister, 622

24. Brother and sister nearer than grandmother, and aunt nearer than great-grandmother, 623

ADMIRALTY AND ADMIRAL.

See MASTER. MERCHANT.

1. Where there is a capture of goods at sea, the admiralty has jurisdiction; if brought to land, either admiral or common law, at the plaintiff's election, *Anonymous*, 16

2. Prohibition may go to the admiralty at any time, if on the proceedings it appears have not jurisdiction, *King v. Broom*, 134, 135

3. By the admiral rule, property of a ship taken from an enemy without letters of mart, vests in the King; and though such ship be after sold on land, suit be for it in the admiralty, for it shall be construed one continued act, *King v. Broom*, 135

4. A capture without a condemnation does not alter the property, *Tremoulin v. Sandys*, 143

5. Libel did not shew the capture was *super altum mare*, though the subsequent proceedings did. Court divided whether prohibition should go, *ibid.*

6. Prohibition denied to go to the admiralty, on refusal to give copy of the libel; for 2. H. 5. c. 3. extends only to ecclesiastical courts, *Anonymous*, 244

7. If ship arrested by the admiralty process within their jurisdiction be rescued, may reappear anywhere, *Rigdon v. Hedges*, 246

8. The cause to bring it within their jurisdiction should appear in their process, *ibid.*

9. Grant to the admiral of all wrecks at sea, and all profits to the said office belonging, will not pass wreck appurtenant to a manor then in the king's hands, *Wiggan v. Brantbwaite*, 259

10. Suit may be in the admiralty for seamen's wages, but not for the master's, *Clay v. Snelgrave*, 405

11. For money taken up for the use of the ship after has begun voyage, suitable in admiralty; *aliter* if money was taken up before voyage begun, *Clay v. Snelgrave*, 406

12. If

A TABLE OF PRINCIPAL MATTERS.

12. If ship be taken or lost in return, shall have all wages out, but only half of wages for time were in harbour abroad, *Anonymous*, 408, 409
13. Mate of a ship may sue in admiralty for wages, *Grant v. Bailey*, 440
14. If ship be lost before arrives at port of delivery, wages are lost; if lost on return, only the wages from thence; if run away, all wages are lost, *Anonymous*, 442
15. Master of a ship may detain the goods for freight; but if he once parts with them, he cannot retake them, *Anonymous*, 511, 512
16. Whether suit may be there for surgeon's wages, *Maddox's case*, 526
3. Indictment wanting the words "*in com*" not amended; *aliter* on information, *Rex v. Lewis*, 249
4. Writ of execution *teste* in Vacation, not amended, *Johnston v. Naylor*, 247
5. Action on a penal statute, and the sum mistaken in the declaration amended, *Broom v. Holford*, 248
6. If the day of *nisi prius* is after the day in bank, it is not amendable, for Judge has no authority to try, *Chick v. Harvey*, 274, 275
7. Writ of error out of C. B. the writ was right, but the judgment ill entered. B. R. cannot mend it, but seems good cause for C. B. to amend the judgment, *Parry v. Pillars*, 311
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9. Writ of error refused to be amended, though affidavit was, that the counsellor's instructions were right, it being to destroy a judgment, *Thomlin v. Crocker*, 369
10. Judgment for damages, mistaking plaintiff for defendant, amended upon motion, *Houghton v. Meade*, 384
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12. In amendment of a declaration plaintiff has election to pay costs, or grant an imparlance, *West v. West*, 441
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- A house of boarders and lodgers for themselves and horses, not an ale-house; nor can soldiers be billeted on them as such, *Parker v. Flint*, 254, 255

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1. Indictment amended after it was in parchment, *Rex v. Knowles*, 39
2. Ejectment against seven, who all appear, plead, and join issue on the plea-roll, *jurat* and *distingas* against the seven; the issue on the *nisi prius* roll was joined by five only, verdict against five only; the *nisi prius* roll is amendable, the Judge having sufficient authority to try the cause, *White v. Bishop of Worcester*, 107

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A P P E A L.

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2. Appeal, though it cannot be altered by common law, or any statute, yet before it be filed it may be altered according to the truth, *Loowder v. Screwdens*, 21
3. It was said, that where a man is found guilty by grand jury or inquest, he is ousted of battail on appeal, *ibid.*
4. The record not being put in on appeal, to be tried at *nisi prius*; neither nonsuit nor discontinuance, only appellant to pay costs. Appearance of appellant's attorney sufficient, being in case of a feme, *Sutton v. Sparrow*, 65
5. Appeal was lodged against a person convicted of manslaughter, but not prosecuted; he was bailed before clergy had, *Armstrong v. Lisle*, 109
6. A person found guilty of manslaughter may be appealed the same sessions; but if not ready the appeal will be gone, *Lisle v. Armstrong*, 157
7. Neither an acquittal, nor an attainder, is a bar to appeal at common law, but the having clergy; which, if delayed by default of the Court, shall not hurt him, *Lisle v. Armstrong*, 158
8. The day the writ is returnable, if it be returned, the appellant may be demanded; and he does not come, the appellee will be discharged, *Stout v. Marson*, 349
9. Infant sued out a writ of appeal, the sheriff delivered it up to the infant, who cancelled it; this is a contempt in the sheriff, *Stout v. Fowler*, 372, 373
10. Infant need not have guardian to sue the writ, but to prosecute it, *Stout v. Fowler*, 374, 375
11. The year being expired, and the writ destroyed, cannot have a new writ

of course; and it is discretionary in the chancellor to grant one, *Stout v. Fowler*, 375

12. If appellant be nonsuit, yet the king may proceed, 374
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14. If writ be ill for want of fifteen days between *teste* and return, by appearance and pleading in chief that benefit is lost, *Wilmot v. Tyler*, 451, 452
15. Appeal should be returned *non est inventus* before *capias*, *Anonymous*, 554
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17. Benefit of clergy, and burning in the hand, is no judgment, *ibid.*

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2. First process in inferior court was a *capias*; it is but a misconveyance of process, and helped by appearance, *Colburn v. Wiseman*, 47
3. Filing a writ of *habeas corpus* is no appearance, but *procedendo* may go notwithstanding, *Anonymous*, 215
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5. Appearance in a civil action is to the end of the suit, to an indictment only of the Term, *Rex v. Foster*, 448
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1. The master of an apprentice in husbandry dies, the justices at the sessions order

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- order his executots to keep him, and quashed; said, perhaps covenant would lie against the executors, *Pratt's Case*, 27
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3. *Mandamus* to admit a person to his freedom, having served seven years apprenticeship, *Morrice v. Mayor of Lincoln*, 190
4. Order of sessions discharging apprentice from his master, good, though no complaint first made to two justices, *Rex v. Hays*, 349
5. Trover will lie by master for a ticket or writing intitling an apprentice to money earned by him; but if never was in his custody, *assumpsit*, *Anonymous*, 415
6. Apprentice cannot be assigned without his consent, *Anonymous*, 441
7. Apprentice is not assignable in law, but if serves his time under the assignment in another town, he gains settlement there, *Rex v. Aickle*, 553
5. If arbitrators choose umpire conditionally that he accept it, if he refuse, may choose again; *aliter* if no condition be annexed, for have executed their authority, *ibid.*
6. A man may undertake as attorney, that B. shall submit to award, *Bacon v. De Barry*, 129
7. Award pleaded to be made *de premissis* must really appear to be so, else ill, *ibid.*
8. Award of mutual releases only, not good, *Freeman v. Bernard*, 130
9. If a sum of money, or other thing, is awarded in satisfaction, it discharges the old duty, and raises a new one, which action will lie, *ibid.*
10. In all cases award should be first, and not referring to any future examination, except in relation to payment of costs, which may be to be such as the proper officer shall tax, *Selby v. Russell*, 139
11. Award made by rule of Court of money to be paid on one side, and nothing done on the other; Court will not grant attachment till release be tendered, *Palmer's Case*, 234

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1. Submission of both parties is a mutual promise, whereon *indebitatus assumpsit* will lie; and award without performance is a good bar, *Crofts v. Harris*, 4
2. Award for a general release to the time of the award; a release to the time of the submission is good, *Anonymous*, 8
3. Award of all matters to the time of the award, good; for shall be in. If no new matter arose between the time of the submission and the award; and if it should award for matters since the submission, it would as to them be void; and a release of all matters to the time of submission, would be a good performance of such award, *Hooper v. Peirce*, 116, 117
4. Award by umpire before the arbitrator's time is expired, is void, *Reynolds v. Gray*, 120
12. Before attachment goes on non-performance of award, must be personal notice, and demand of the money; or of endeavour to find and serve him, *Anonymous*, 237
13. Before attachment for non-performance of award, should be affidavit of award demanded, *Chanler v. Driver*, 317
14. Award of mutual releases not good; for nothing awarded which will bear action, *Anonymous*, 423
15. Submission to award of A. and B. provided they make award by a certain time; and if cannot agree, to umpirage of such as they should choose; umpire so chosen may make award within the time; for by choosing an umpire have determined their arbitrariness, *Mitchell v. Harris*, 512
16. But if the umpire was expressly named in the submission, his umpirage within the time would be void, 513
17. On

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17. On motion to make submission of award, rule of Court should be notice, *Anonymous*, 525
18. If only part of an award be set forth, and conclusion be with a *proferet*, if defendant craves *oyer*, and demurrer, it is ill for the variance, *Furlong v. Thornigold*, 533
19. Award may be good in part, and void in part, *Furlong v. Thornigold*, 534
20. A void part of an award need not be set forth, *ibid.*
21. Award to do a thing which is out of a person's power, is void, *Lee v. Elkins*, 585
22. Award of distinct things may be good in part, and void in part, *ibid.*
23. If award exceeds time of submission, nothing shall be supposed to have intervened, *ibid.*
24. If the day of performance appears on the record, performance may be averred, or breach assigned, by referring to it with a *præd.* *Lee v. Elkins*, 586
25. Though award be void in part, if it be mutual for another part, it will be good for that, *Lee v. Elkins*, 587
26. Where a particular thing is to be done on one side, as a condition for doing several others on the other, if any are ill awarded, it is ill *in toto*, 587
27. Where a void thing is awarded as a condition precedent, the doing of it must be averred, 588
28. Where several things are awarded, on performance *præmiss*, the other is to release, averment of performance of what is well awarded is sufficient, *ibid.*
29. Release to the time of submission, good performance of award of release to the time of award, 589
30. *Sed per TREVOR*: That is only when general release is awarded, not where it is expressly said to be to the time of the award, *ibid.*
31. *PER TREVOR*: If it appears that a void part of award was intended as a consideration of doing a thing on the

other side, it must be averred, *Lee v. Elkins*, 590, 591

32. Debt on award, defendant sets forth a void award, verdict for plaintiff; judgment arrested, *Anonymous*, 635

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If on a declaration where part is good, and part ill, a writ of enquiry be executed for the whole, or entire damages given, judgment may be stayed, *Anonymous*, 5

A S S A U L T.

See TRESPASS.

ASSEMBLIES UNLAWFUL.

See RIOTS.

A S S E T S.

See OCCUPANT.

1. Executor takes bond from debtor of testator, this is assets, *Anonymous*, 346
2. Executor not giving in an inventory, is presumption of assets, *Anonymous*, 346
3. If wife continues suit begun by her and her husband for a debt due to her, when recovered it shall not be assets, *ibid.*
4. Bond given in trust is not assets, *Nichol v. Bridebridge*, 381
5. In pleading want of assets the time must be set forth, *Ingram v. Foot*, 611

A S S I G N M E N T.

Lease assigns the term to a person, who assigns it over to *A.* without notice to the lessor; lessor cannot have covenant against his lessee for arrears of rent due after the assignment to *A.* *Pitcher v. Tovey*, 23

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ATTACHMENT.

1. An attachment in chancery on an *alias et pluries* is returnable in *B. R.* and is not merely for the contempt, but an action on which shall recover damages for the delay in executing the writ. It is a contempt not to return the first *mandamus*, *Anonymous*, 164
2. There are two sorts of attachments on a mandatory writ; the one intitles the party to damages; and that must be on the *pluries*; and the other punishes the contempt, which may be on the *alias*, *Anonymous*, 348
3. On *rescous* returned, attachment shall go without motion, *Anonymous*, 247
4. Must be personal notice before Court will grant attachment for not performing an award, *Anonymous*, 257
5. If interrogatories be not exhibited in a week, the recognizance entered into is discharged of course, *Holland's Case*, 310
6. And the party has four juridical days to answer them, whenever filed; and, if they are not answered in that time, he is committed on motion, *ibid.*
7. Motion for attachment on affidavit that he kept out of the way, and could not be served with peremptory *mandamus*, 312
8. Before attachment on award, should be affidavit, that award was demanded, *Rex v. Tooley*, 317
9. A misdemeanor in an officer of an inferior court is a contempt of *B. R.* *Starkey's case cited*, 374
10. Sheriff delivered up a writ of appeal to the appellant, an infant, held a contempt, and fined for it, *Stout v. Fowler*, 374, 375
11. If costs taxed by a master are not paid, attachment goes, *Anonymous*, 493
12. If interrogatories are impertinent or improper, may be demurred to, *Rex v. Row*, 499
13. *Certiorari* must be delivered before can be in contempt, *ibid.*
14. If one brought in, in contempt, denies upon oath, he is discharged; but

if he be forsworn, he may be prosecuted for perjury, *Rex v. Sims*, 511

ATTORNEY AND SOLICITOR.

See PRIVILEGES.

1. If attorney on motion has his name struck out of roll, he shall not after be admitted to act as one, *Anonymous*, 247
2. Attorney having promised to accept a declaration, obliged to do it, *Killey v. Weyberg*, 251
3. Attorney of *B. R.* sued for fees in the sheriff's court, obliged to refer them to a matter, for he is under the power of the Court, *Best's Case*, 251
4. Attorney executor not intitled to privilege, *Newson v. Roseland*, 315
5. Attorney on record cannot be changed, without leave of the Court, and when he is so changed the record ought to mention it was done by leave of the Court, *Anonymous*, 443
6. After judgment the attorney on record may receive and acknowledge satisfaction, *ibid.*
7. Attorney may be ordered to deliver up papers to the owner, *Anonymous*, 516
8. But not without agreement to pay his reasonable demands, *Anonymous*, 554
9. A person, who could get no attorney to appear for him, had one appointed by the Court, *Trezanion's case*, 583
10. Action against attorney for money received; the attorney moved to have his own bill taxed, and allowance of what was due: Court will not interfere, *Craaddock v. Glen*, 657
11. Attorney, who gives another leave to practise in his name, is answerable for what he does in his name, *Anonymous*, 666

AUDITA QUERELA.

1. *Addita querela* is not a *superfedeas*, and execution shall not be stayed without a special *superfedeas*; and that shall not be

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- be granted till the matter of the *audita querela* be proved by two witnesses, *Anonymous*, 105
2. When one is relieved on *audita querela*, he is restored to whatsoever he lost by the first judgment, *Anonymous*, 598
3. If has release which he had not opportunity of proving, and bring reasonable proof of it, Court will relieve on motion, and supersede execution. *ibid*:
- the power, it shall be taken to be done by the power, *Parker v. Ket*, 469
7. A steward *de facto* having an appearance of authority does acts, his acts are good, *Parker v. Ket*, 470
8. So lord *de facto* may receive surrenders, and make admittances, and are good; but to make voluntary grants must have a right, *Parker v. Ket*, 472
9. Authority may be given by pael to endorse his name on a bill of exchange, *Anonymous*, 564

A V E R M E N T.

See TRESPASS.

1. In trespass, assault and battery, if defendant vary as to the time, must aver *quæ est eadem transgressio*; but where he agrees in the time, need not, *Rex v. Hebbard*, 48
2. Where foreign coin is demanded, it is always in the *detinet*, with averment that defendant has neither rendered it or the value, *St. Ledger v. Pope*, 81
3. Averring lands are deficient, puts the proof on the pleader, *Berty v. Dorem*, 526

A V O W R Y.

See REPLEVIN.

A U T H O R I T Y.

See COPYHOLD.

1. If a person who is a deputy steward appoint a person to take a surrender, it is good, *Anonymous*, 525
2. See also *Thorpe v. Thorpe*, 466
3. Deputy has all the power of the principal, and if abridged by proviso, the proviso is void, *Parker v. Ket*, 467
4. Deputy sheriff must do acts in the name of the high sheriff, because the writs are directed to him, *Parker v. Ket*, 468
5. Deputy steward of a manor may do it in his own name, *ibid*.
6. Where a person, having a power, does an act without reciting his power, which would not be good, but under

A W A R D.

See ARBITRAMENT.

B.

B A I L - B O N D.

See SHERIFF.

BAIL IN CIVIL CASES.

1. Two actions were against the same person, and the same persons bail in both; a *reddidit se* in one action is a discharge of bail in the other, *Williams v. Battw*, 99
2. *Scire facias* against bail, who come in and plead payment before the return of the second *scire facias*, ill; for the recognizance is broke before the issuing the first *scire facias*, *Coniers v. Manncaptors of Rawlins*, 112
3. Where there is surrender in discharge of bail before forfeiture of recognizance, need not give notice; *aliter* where it is forfeited, and a *capias* gone, and *non est invent.* returned, *Anonymous*, 236
4. Bail is not excepted against in *London*, but a proper officer takes it; which if insufficient, he will be liable to have the profits of his office sequestered till the debt be paid.—When a cause is removed out of *London* into *B. R.* the bail and clerk below are discharged, *Adams v. Cox*, 249
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5. In action against master of a ship for embezzling goods, shall be special bail; but on negligent keeping, common bail, *Anonymous*, 251
6. On special *assumpsit* for money won at play, shall be special bail, *Carrill v. Cockran*, 295
7. Whether additional bail be of the Term in which it was put in, or of the Term in which the original bail was put in. *Quar. Corps v. Kitchen Hall*, 318
8. Bail in error cannot discharge himself by surrender of the principal, *Shoot v. Higgs*, 319
9. Common bail being regularly filed, shall not after make oath of the debt being above ten pounds, *Anonymous*, 324
10. In debt against bail, principal may be surrendered, as in case of *scire facias* and two *nibils* returned, *Watt's Case*, 351
11. After exception to bail must be justified, or cannot proceed to trial, *Anonymous*, 385
12. Special bail sometimes granted in *scandalum magnatum*, *The Duke of Schomberg v. Murray*, 420
13. If prisoner renders himself in discharge of bail in a Judge's chamber, the entry signed of it by the Judge is the record of it, and should be filed in the office, *Clapham v. Wray*, 423
14. On exception taken to bail, notice should be to the defendant's attorney, *Anonymous*, 435
15. Plaintiff may refuse assignment of bail taken by the sheriff, and proceed against him by amercements, 447
16. Bail to the action may plead usurious contract, *Anonymous*, 493
17. Heir sued as such, not to be held to special bail no more than executor, - *Anonymous*, 511
18. Bail can never surrender, or party surrender himself in discharge of bail, but on return of process, or when in court by bail, *Anonymous*, 525
19. On common bail filed, if declaration be not delivered before the end of two Terms, shall be nonsuit, *Taylor v. Bruden*, 526
20. If good cause of action be not made out before a Judge, common bail shall be ordered; and if plaintiff do not give notice that he will move the Court, the order is final, *ibid.*
21. Several causes of action cannot be joined to enforce special bail, *Anonymous*, 527
22. To reverse outlawry for error in law, special bail need not be to the original action, as it must for want of proclamations, *Wilbram v. Dely*, 545
23. Special bail to reverse the outlawry, is to answer the condemnation; other special bail is, or to render the body to prison, *Wilbram v. Dely*, 545
24. Render of principal in discharge of bail is not a *committitur* till entered, *Anonymous*, 559
25. After *capias* returned against the principal, plaintiff may proceed against bail notwithstanding a writ of error, *Dundee v. Petty*, 567
26. On a *reddidit se* of the principal before a Judge, the bail is discharged, but the marshal is not liable for escape till notice of *committitur*, *Walsen v. Sutton*, 583
27. Principal died before return of the second *scire facias* against bail, yet cannot discharge them. Death of the party before return of the *capias*, a good plea to the *scire facias*, *Anonymous*, 601, 603
28. Proceedings on bail-bond cannot be stayed till other bail put in, *Anonymous*, 614
29. If special bail be required in inferior court, and the cause be removed, special bail shall be put in above, else *procedendo* shall go, *Croft v. Smith*, 646
30. Bail to have eight days in full Term after return of process against the principal to render him, *Smith v. Orstring*, 650

BAIL

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BAIL IN CRIMINAL CASES:

1. A person indicted above two Terms for treason, is afresh indicted for the same species of treason differently laid; Court inclined might be bailed, but gave no opinion, but did it by virtue of their discretionary power, *Crosby's Case*, 66
2. So also *Rex v. Lord Aylsbury*, 117
3. Bail not allowed in manslaughter till clergy, *Rex v. Keat*, 102
4. See also *Armstrong v. Lisle*, 108
5. Appeal was lodged against a man convicted of manslaughter, but not prosecuted; he was bailed before clergy had, *Armstrong v. Lisle*, 109
6. A person indicted for murder seldom bailed without very extraordinary reasons, though it be in the power of the Court, *Rex v. Kirk*, 309
7. One of ill fame not bailable by *Westminster the Second*, *Anonymous*, 431
8. Person charged with buggery not bailable, *Anonymous*, 435

BAILIFF.

If one be found bailiff generally, he shall account for all in the declaration, *Heliard's Case*, 420

BANKRUPTS.

1. A term was assigned by the commissioners to a creditor, who before inrollment of the assignment made a lease, and then inrolled the assignment; such lessee cannot maintain ejectment, for till the inrollment it is no sale by the commissioners, *Elliot v. Danby*, 3
2. Commission of bankruptcy may be taken out against a person who had left off trade for a fact committed while in trade, *Mozgot v. Mills and Waine*, 159
3. Infant cannot be a bankrupt; for though the debts of an infant are only voidable at his election, yet no one can be a bankrupt for debts he is not obliged to pay, *Rex v. Cole*, 243

4. Chancery may refuse to grant a commission without petition; but if so, shall not vitiate, *Turner v. Maine*, 306, 307
5. *Indebitatus assumpsit* by the assignee of commissioners of bankruptcy for goods sold after bankruptcy committed, lies, or may bring trover, but not both, *Huffey v. Fiddall*, 324
6. By bankruptcy the property is in the creditors, and assignee is to have the same remedy as bankrupt would have had, *ibid.*
7. General *indebitatus* lies, *ibid.*
8. If one of the joint traders is bankrupt, his proportion is only assignable, *Anonymous*, 446
9. If a creditor obtain judgment, subsequent to act of bankruptcy, on commission taken out the judgment is avoided, *ibid.*

BARONS.

See PEERS.

BARON AND FEME.

1. There is no difference in the case of baron and feme, and any other two persons, where one of them is found guilty in trespass, *Hare v. White*, 19
2. Husband may release costs decreed to the wife in the spiritual court, if there be no divorce; for if there be, she is intitled to alimony, and out of that the costs are supposed to proceed; which cannot therefore release; but a legacy he may, as belonging to him, *Chamberlain v. Hewitson*, 89
3. Promise made to a man for payment of a debt due to his wife as executrix; action for this promise must be brought by the baron alone, *Yard v. Ellard*, 207
4. If a wife part from her husband by agreement, and he make her allowance after such separation, if it be notorious, he is not chargeable for necessities, *Todd v. Stokes*, 244, 245
5. Personal knowledge of such agreement is not necessary, if notorious, *Todd v. Stokes*, 245
6. But

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6. But if the debt be contracted within so short a time, as the separation could not be supposed notorious, he shall, *Todd v. Stokes*, 245
7. If she go away without consent, she must find her own credit, without charge to the husband, *ibid.*
8. And general notice not to trust her is sufficient, *ibid.*
9. Trespass against baron and feme, baron dies, yet well, for wife may commit trespass along with her husband, 246, 247
10. In personal actions *ne unque accouple* in matrimony no plea, as it is in real actions, *Mitchell v. Garrett*, 276
11. Marriage is a release of all bonds which may become due during the coverture, *Cage v. Aiton*, 290
12. If executrix marry the debtor, it is no release, for that would be a *devastavit*, *ibid.*
13. Any thing that by possibility may accrue to the wife during coverture, husband may release; but what cannot, he cannot release, *Cage v. Aiton*, 294
14. Covenant or promise by a stranger to leave the wife so much, if she survived, husband cannot release, *ibid.*
15. Bond made to a woman before her marriage, to leave her worth so much if she survived, is not extinguished by the marriage, *ibid.*
16. If wife continue a suit begun by her and her husband, for debt due to her, when recovered it shall not be assets, *Anonymous*, 346
17. Husband may bring an action alone for money promised him as his wife's portion; but if not recovered during coverture, the wife shall have it to her own use, *ibid.*
18. Cohabiting with a woman, and owning her as his wife, good evidence to charge the man, *Carr v. King*, 372
19. Feme gave letter of attorney to confess judgment, and marries; Holt inclined it should be entered in the woman's name as sole, *Reignolds v. Daw*, 383
20. Whether fines and recoveries by *feme-covert* under age may be vacated, purchasers being concerned, *Sarah Griffiths's Case*, 444
21. The old way was to bring error, but as the husband would not join, doing it by motion was introduced, *ibid.*
22. If *feme-covert* be outlawed; the feme may now be discharged on motion, *Sarah Griffiths's Case*, 444, 445
23. If coverture be pleaded in abatement, needs no *venue*, only the husband's name should be shown; but if in bar, must be laid at a certain time and place, *Vezey v. Smith*, 503
24. Discourse of a *feme* given in evidence for the defendant, on action brought by baron for debt due to the wife as a separate dealer, *Anonymous*, 565
25. Separate trader cannot be sued for a debt contracted by her in the way of trade, if her husband be living, *Anonymous*, 603
26. Feme may plead *non est factum*, and give coverture in evidence, *Anonymous*, 609

B A R R E T T Y.

See Usury.

B A S T A R D.

See BARON and FEME. PROHIBITION.

BILL OF EXCEPTIONS.

See TRIAL.

BILLS OF EXCHANGE, MERCHANTS NOTES, &c.

1. Bill of Exchange payable to A. or bearer, not assignable, *Hodges v. Steward*, 36
2. But if indorsed, is a good bill between indorser and indorsee, for in nature of a new bill, *ibid.*
3. Though a bill be drawn by a person who is no merchant, yet the drawing the bill makes him a trader within the custom of merchants, *Hodges v. Steward*, 36, 37
4. General

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4. General *indebitatus assumpsit* will not lie on a bill of exchange, but a special action on the case and custom of merchants, or an *indebitatus* for money received to his use, *Hodges v. Steward*, 37
5. Bill of exchange, though in writing, is no more than a simple contract, *Yeoman v. Bradshaw*, 107
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12. If indorsee do not demand the money of the drawer in a convenient time, the indorser is not liable, *ibid.*
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19. Note to pay the bearer not bill of exchange, only evidence of money lent; and declaring on the custom of merchants will not make it a bill of exchange, *Carter v. Palmer*, 380
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21. Acceptance of a bill of exchange is an actual promise to pay; and acceptance after the bill is payable binds the acceptor or indorser, though perhaps not the drawer, *Misford v. Walcott*, 410
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11. Penalty for breach of a bye-law may go to the corporation, and be considered as damages, *City of London v. Wood*, 686, 687

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1. A steward cannot fine a person for not accepting that office, unless he refuse in open court, but must be presented by the next leet, and amerced, and that amerciament affirmed, *Fleteber v. Ingram*, 88

2. *Notitiam habuit* of his being elected constable is too general ; should plead he was summoned to accept the office in convenient time, to take oath before the justices of peace, *ibid.*

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7. Every vill must have a constable, else it is but a hamlet, *ibid.*
8. Order for making a constable quashed, it not appearing he was an inhabitant of the liberty, *Anonymous*, 256
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12. Constable at his peril to take notice that the justice of peace continues in the commission, *Normand v. Mills*, 347
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5. If defendant plead as to part, and says nothing to the rest, it is discontinuance, unless will take judgment by *nil dicit*, *Mally's Case*, 421
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11. If continuance be not alleged, it shall be intended a discontinuance, *ibid.*
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13. In

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2. By a surrender of liberties and privileges the corporation is not dissolved, *Rex v. Mayor of London*, 19
3. If a corporation be made to a particular purpose, and they devote themselves of all right, so that the end of the institution fails, the corporation is dissolved, *ibid.*
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8. On nuisance, consequential damages may be given in evidence, for there the *gist* of the action is the damage, but not so in trespass, for there it is one continued act, *Hampstead Case*, 519
9. In writs of enquiry, the jury lets their hands and seals to verdict, *ibid.*
10. Whether *second deliverance* be a *superfedeas* to writ of enquiry in replevin, *Pratt v. Rutlers*, 546
11. Judge of *nisi prius* only assistant in writ of enquiry, *Anonymous*, 610

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1. Date of a bond is the delivery of it, *Pullen v. Benson*, 204. 651
2. Promise to pay money a twelve-month from the day of the date; it is due that day twelve-month, *Fanshanz v. Harris*, 256
3. If declares that defendant such a day *concessit se tueri* by bond, bond shall be supposed to be then delivered, whatever the date be, *Lane v. Green*, 651

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1. Rent due on an expired parol lease, is of equal degree with debt due on a bond, *Godfrey v. Newton*, 7
2. Debt with averment in declaration differs from the condition of a bond, for the plaintiff in the action must fully intitle himself; but the condition of a bond goes only in defeazance, and must come on the part of the defendant, *St. Ledger v. Pope*, 81
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1. If a declaration be good in part, and bad in part, it is good for what is well declared; but if writ of enquiry is executed for the whole, or entire damages given, judgment may be said, *Anonymous*, 5
2. Rent due the twenty-third of September declared for as due at Michaelmas, ill: Had been good to have declared for rent *aretro* at Michaelmas, *Smith v. Bromley*, 5
3. Action, for practising physic without license, laid at Westminster in county of Middlesex, not saying within seven miles of London, ill, *College of Physicians v. Bassett*, 10
4. A declaration in trespass wanting *et armis*, is ill; for it would alter the judgment from *capiatur to misericordis*, *Anonymous*, 24
5. Declaration for more rent than appears to be due; on release of the overplus may have judgment for the residue, *Thwaites v. Ashfield*, 93
6. If an act of parliament increase a penalty, or deprive a man of a benefit he had before at common law, must shew to be within it, else a conclusion *contra formam statuti* is ill; but if there be no act of parliament, it is only surplage: and where some things are within the act, and some not, as to those not within it, it is only surplage, *Bennett v. Talboys*, 122

7. If declaration is not delivered by the last day of the second Term, the defendant is not obliged to accept a declaration, but may sign a *non prof.* *Barnes v. Geering*, 217
8. If declaration be delivered the day before the last day of the Term, the defendant has two days in the following Term to answer, *Anonymous*, 231

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1. Defendant pleads conditions performed, plaintiff sets forth the covenants, and assigns breach; defendant rejoins that he paid so much in money, and so much in taxes; this is a departure, *Count Auan v. Crisp*, 54, 55
2. The precise day in case is not material; and if the defendant forces the plaintiff to vary from it, it is no departure, *Hoard v. Tennison*, 92

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1. Devise of a term to *A.* and the heirs of his body; and if he dies without issue, living *B.* it is good to *B.* *Lamb v. Archer*, 44
2. Devise for fifty years to *A.* if *A.* should so long live; and after to the heirs male of *A.* and for default of such issue, to *B.* in tail; the remainder to the heirs male of *A.* is void, there being no freehold to support it; and the remainder to *B.* takes effect presently, *Goodright v. Cornish*, 52
3. Devise to *A.* in case that within three years she marries with *B.* and if not devise over; propofals were made and

rejected, she marries another person; decreed this was a condition precedent to the vesting the estate; which not being complied with, the estate to go over. *Quær. Berty v. Lord Faulkland*, 182

4. Devise to the first issue male of *A.* (*A.* having none at that time) is void, *Hilliard v. Gennings*, 278
5. Devise to *A.* foreleven years; "Item, "I give to the first issue male of *B.* and "his heirs of his body; and for default "of such issue, to the first issue of *C.*" *B.* had not issue at the time, *C.* had; the devise to the first issue of *B.* is not good by way of remainder, there being no freehold to support it, *Scattergood v. Edge*, 283, 284
6. Nor as an executory devise, it being *per verba de presenti*, and not by way of remainder, *Scattergood v. Edge*, 284
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8. One seised of two houses devises one of them to *A.* and her heirs, she paying his legacies, in case his goods and chattels were not sufficient; and if she did not make provision for the payment of them in her life-time, the legatee might sell the same, "and all the "overplus of my estate to be at *A.*'s "disposal," and made her executrix; the second house does not pass, *Shaw v. Bull*, 592, 593
9. Words which of themselves would disinherit an heir at law, if joined with others which make them less forcible, shall not, *Shaw v. Bull*, 594

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1. Distress taken by the bailiff of the hundred of *A.* in the hundreds of *A.* and *B.* being contiguous; the bailiff of *A.* sells in the hundred of *B.* having given notice; it is good, being an entire distress, which cannot be severed, *Walker v. Rumbald*, 76
2. And personal notice answers the intent of the act; and is more than it requires, *ibid.*
3. The goods of a ship may be distrained for the port-duties of goods shipped on board it, *Venkefline v. Edden*, 216
4. If distress for *damage-feeasant* die in pound, or escape, he cannot retake it; but if had been for rent, may distrain *de novo*, *Anonymous*, 397
5. Appearance in inferior courts, to be enforced by reasonable distress, *Anonymous*, 610
6. Which if rescued, steward may impose a fine, *ibid.*
7. Officer cannot for such a fine break a house, *ibid.*
8. If distress escape out of pound, cannot bring trespass, unless it appears it was without default, *Vaspor v. Edwards*, 658
9. If cattle distrained be put in pound overt and die, action may be brought, or distress *de novo*, *Vaspor v. Edwards*, 662
10. So if stole out of it, *ibid.*
11. As long as distress is detained, it is a bar in trespass, *Vaspor v. Edwards*, 663
12. Distress is not obliged to be put in common pound, but pound overt, *Vaspor v. Edwards*, 664
13. The pound is the pound of the distrainer, though in another man's soil; which if broke, *parco fracto* lies, *ibid.*
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2. Spiritual court can never enforce distribution, unless there be no will; or a will directing it; chancery sometimes does, *Anonymous*, 566
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1. Feme not to be endowed of *caput baronie*, that is really so; but of a capital messuage she shall, *Gerrard v. Gerrard*, 84
2. Elopement being pleaded in bar of dower, feme replies, that her husband sold her to the adulterer, ill, *Carr v. Berty*, 232

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1. Ejectment on a demise by a corporation aggregate was not set forth to be by deed, yet good; for the demise is confessed to be good, by confessing lease, entry and ouster, *Anonymous*, 113
2. Ejectment brought on a demise subsequent; the bringing of the ejectment not amendable, *Puleston v. Warberton*, 125
3. If tenant suffer judgment to go against him, without acquainting his landlord, the Court on motion will not suffer execution to be taken out, till the right be tried, *Anonymous*, 211
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6. A person who had judgment in ejectment, may bring debt or distress for rent, notwithstanding a writ of error, and might have entered without a writ of execution; only executions by writ are suspended by writ of error, *Badger v. Field*, 398
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8. A Judge of *nisi prius* may record a *retraxit* against one, and proceed against the others, *Gree v. Rolle*, 652
9. If one of the defendants die, suggestion may be of it, and proceed against the other, *Gree v. Rolle*, 653
10. In ejectment cannot be nonsuited as to one, and proceed against the other, *Gree v. Rolle*, 656
11. If one defendant will not appear, or confess lease, entry and ouster, he shall be acquitted; and plaintiff may proceed against the others, *ibid.*
12. And judgment on the Judge's certificate, shall be against the casual ejector, for so much as was in the hands of him who would not appear, or confess lease, &c. *ibid.*
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 2. What estate party had should appear, *Rex v. Dorney*, 417
 3. If inquisition be quashed, restitution is not of course, *Anonymous*, 423
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award restitution without inquisition, *Anonymous*, 495

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1. Where two defendants join in pleading, and one dies after the *venire facias*, judgment should be prayed against the living one only, else it is error, *Woolbridge v. Chaberry*, 1
2. An infant in replevin joined with others, appeared by attorney; this not assignable for error, because might have been pleaded in abatement, *Goss v. Bowles*, 1, 2
3. Writ of error must be of a common return, else ill; where the writ of error is *ubique*, the *scire facias* ought to be on a common day, *Anonymous*, 5
4. No writ of error lies in the exchequer chamber on a *scire facias*, on a judgment affirmed there, *Hartop v. Holt*, 105
5. On writ of error out of county palatine of Chester, the plaintiff in error delayed to bring in the record; on a certificate from the king's bench office, that the record is not come, the chancery will grant execution of course; *Hodgeson v. Segrave*, 127
6. Where there are two plaintiffs in error, and one dies, the death must be suggested on the roll before execution can be taken out, *Benneyer v. Brack*, 250
7. Error brought on judgment in ejectment, pending which, trespass will lie for the mean profits, *Dorrford v. Ellis*, 138
8. Death of one plaintiff in error does not abate the writ, *Wicket and Frow v. Cramer*, 240
9. Want of original assigned for error, an original of another Term, and no continuance, is no original, *Jennison v. Ellis*, 320
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tionem*, *Anonymous*, 371
11. Action laid in one county, and original sued out in another, is error, *ibid.*
12. Error will not lie to a new created jurisdiction, which proceeds by methods different from common law, but *certiorari*, *Grenville v. College of Physicians*, 390
13. A person was burnt in the hand for felony: that there was no judgment of attainder, so error would not lie, but *certiorari*, *ibid.*
14. Person who has judgment in ejectment, may bring debt for rent or distrain, notwithstanding writ of error pending, *Badger v. Floyd*, 398
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16. On award of restitution on reversal of attainder, *scire facias* should go to the terre-tenants, else will be error, *Dillon v. Walcot*, 407
17. If plaintiff dies, pending a writ of error, and execution be taken out without acquainting the Court with it, it will be set aside for irregularity, *Anonymous*, 494
18. In debt, if the original be recited to be *attach*, instead of *summonitus*, it is not error, being only recital, *Anonymous*, 513
19. Writ of error varying from the *placita*, does not remove the record; and execution may be sued notwithstanding such writ, *Anonymous*, 523
20. To make *capias* returnable the same day summons is returnable, is error, *ibid.*
21. Release of errors sets irregular judgment right, *Anonymous*, 560
22. Writ of error cannot be discontinued without leave of the Court; and if error be not assigned, judgment will be affirmed, *Lewing v. Calvary*, 561
23. After *capias* returned against the principal, may proceed against the bail on the recognizance, notwithstanding a writ of error; for that is no *superfideas* of the recognizance, *Dundas v. Pitt*, 567
24. Plaintiff in error cannot move to quash his writ of error before error assigned, *Anonymous*, 602
25. Writ of error *ad prox. sessionem parliamenti*; and before that time it was dissolved, and day fixed for the meeting of another, whether *superfideas* of execution, *Peters v. Benning*, 604
26. If a Term intervene between prorogation, execution may be sued, by the opinion of *Hale* and *Keeling*, *Peters v. Benning*, 605
27. If writ of error be left with the lords and a prorogation comes, it is a *superfideas*; but the writ of error is not discontinued, *ibid.*
28. Error assigned, that it was a bond taken *colore officii* for appearance, and not said it was taken by name of the sheriff; cannot be assigned for error, but statute should have been pleaded, *Jones v. Sweetapple*, 634
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3. If sheriff suffer one in execution to escape, the plaintiff has his election to sue the sheriff or defendant; but he cannot have a *capias* without a *scire facias*, *Anonymous*, 230
4. By a *reddidit se* before a Judge the bail is discharged; but marshal not chargeable for escape till notice of the committitur, *Watson v. Sutton*, 583
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2. Where an original is evidence, the copy of it is, *Case of the Manor of Bray*, 24
3. A person claiming by the custom no good evidence; but a tenant of a manor, who does not claim it, is, *ibid.*
4. Similitude of hands not sufficient for an original foundation of attainder, though good circumstantial evidence, *Rex v. Crosby*, 72
5. *Camden's Britannia* to prove a particular custom, in evidence, refused as to the general history of the kingdom, which cannot otherwise be proved, had been good evidence, *Stayner v. Droitwich*, 85
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7. Printed proclamation, or printed act of parliament, though private, if concerns a whole county, good evidence, though not compared with the record, *Dupays v. Shepherd*, 215, 216
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10. Judge's hand to his certificate of the conviction of a malefactor to be proved, *Bignoll v. Rogers*, 310
11. Verdict in a civil cause may be given in evidence in a criminal cause; but not *vice versa*; and new trial in a civil cause, which may be evidence in a criminal cause, seldom granted, *Richardson v. Williams*, 319
12. A prisoner who had given a bond for his being a true prisoner, admitted a witness to prove a voluntary escape, *Rex v. Warden of Fleet*, 338
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14. No record of conviction or verdict can be given in evidence, but such as both parties might have produced, *ibid.*
15. Legacy charged on land by will, the probate of the will given in evidence, and positive proof of death of two of the witnesses, and circumstantial proof of the death of the third admitted, at the distance of fifteen years, *Anonymous*, 342
16. What would not be evidence for one, cannot be produced for the other, *Clarges v. Sherwin*, 343
17. Cohabiting with a woman, and owning her for his wife, good evidence to charge the man, *Car v. King*, 372
18. On avowry for rent-charge devised, as he was not intitled to the will, he produced the ordinary's register of the will and former payments; good evidence, *Anonymous*, 373
19. Trespass, and getting his wife with child; the declaration of the woman no evidence, *Adams v. Arnold*, *ibid.*
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- because copy may be had at the Rolls, *Cutt's Case*, 394
21. If tenant claim by copy, lord is only ordered to let them be seen, but not to bring them into court, *Cutt's Case*, 394-494
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29. A. being indebted to B. gives him a note in a feigned name, which note was run away with; A. pays B. the money, action is brought against A. on the note, B. is no evidence to prove the note run away with, *Anonymous*, 564-565
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2. Process for excommunication may be served on *Sunday*, notwithstanding 29. Car. 2. *Brookbank v. Allanson*, 275
3. The writ of *excommunicato capiendus* need not specify the cause specially, but should appear on the *significavit*, *Rex v. Fowler*, 418
4. *Excommunicato capiendus* for non-payment of costs in *quodam negotio educationis puerorum*, without licence, ill, *Rex v. Hill*, 517
5. The cause of excommunication ought to be certainly set forth, *Rex v. Hill*, 518
6. Before the statute, if the cause returned was insufficient, should go into chancery for a *superfedeas*; but that cannot be done now, the writ is returnable in B. R. where, if it be wrong, it must be qualified, *Rex v. Hill*, 519
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2. Submission to award by executors is a *devastavit*, *Anonymous*, 11
3. Pleading six judgments confesses assets for above five; and in replication should not conclude to the country, but *hoc parat. est verificare*, *Ashton v. Sherman*, 153, 154
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6. Suit may be against one both as heir and executor, *Anonymous*, 328
7. If executor suffer judgment to go against him by default, it is an admission of assets; and the sheriff may on the *feri facias* return a *devastavit*, *Rook v. Sheriff of Salisbury*, 411
8. Reason why executor on nonsuit is not to pay costs, is his being supposed ignorant, *Anonymous*, 440
9. If rightful executor bring trespass against *tert* executor, he may give evidence of payment of rightful debts in mitigation of damages; yet the right of action and verdict shall be against him, *Anonymous*, 441
10. If *tert* executor pay debts with the goods, the rightful executor shall not avoid the payment, though may maintain trover against the *tert* executor; but shall only recover in damages what he has misapplied, *Parker v. Kett*, 471

11. Executor must plead all the judgments in force against him, else shall never have advantage of them, *Atfield v. Parker*, 496
12. If executor plead a judgment generally, he confesses assets for so much, and cannot after say he has assets to a less value, *Parker v. Atfield*, 527
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3. The *Husting* is the county court in *London*, *Anonymous*, 320
4. Officer may take some reasonable part of the defendant's goods to compel appearance; and on attachment of goods the custom is to leave them in the party's hands till the matter be determined, *Anonymous*, 326
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2. But seoffment by him is only voidable on account of the notoriety of it, *Thompson v. Leach*, 173
3. Idiot cannot gain a settlement, *Anonymous*, 322, 323
6. *Mandamus* to admit a person to his freedom, having served seven years apprenticeship, *Rex v. Morrice*, 150
7. *Mandamus* must be delivered to him who is to make the return, *Rex v. Mayor of Exeter*, 251
8. Return ought to be by the mayor, with the consent of the major part of the corporation; and if he does it, not having such consent, information will lie against him for false return, *Rex v. Borough of Abingdon*, 308
9. In case for a false return to a *mandamus*, need not alledge that they ought to obey it; for by making a return that is admitted, *Mayor of Norwich's Case*, 322
10. Cannot sue out a joint *mandamus*, for the wrong done to one is not so to another, *Rex v. Andover*, 332
11. Two cannot bring action for false return to *mandamus*, *Butler v. Rewe*, 349
12. Return to *mandamus* requires the greatest certainty, because it cannot be helped by pleading, *Rex v. Abingdon*, 401
13. Where a new jurisdiction is created by act of parliament, *B. R.* may command the execution of it by *mandamus*, *Rex v. Glamorganshire*, 403
14. Action for false return is local, but may be laid either where the return was, or where it is of record, *Lord v. Francis*, 403
15. If person be irregularly chose, and after is regularly entered in the Books, or elected to a superior dignity, evidence of an election not to be controverted, *Lord v. Francis*, *ibid.*
16. If officer makes an ill return, he shall be amerced; if makes a second ill, attachment shall go, *Anonymous*, 410
17. It is a good return to a *mandamus* to swear a person in a common-council man, that he had not taken the *oath* pursuant to 23. Car. 2. *Rex v. Love*, 601
18. No *mandamus* to swear in a Register, but should have assize, *Dallard v. Gerard*, 609
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1. *Non fuit debite electus* a good return, being a direct answer to the writ, which recites *licet fuit debite electus*, *Rex v. Lambert*, 2, 3
2. Return to a *mandamus* to restore *A.* to his place of alderman was, that he had removed out of the city; and *licet* being summoned to attend, he did not, held good return per three Judges against *HOLT*, who held a particular summons was necessary to shew why he should not be disfranchised; for he might have good reason of absence, as sickness, which by this way he would be deprived of shewing, *Rex v. Glide*, 27, 28
3. If a crime, for which a person is removed, is not well set forth in the return, peremptory *mandamus* shall go, *Rex v. Shaw*, 113
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2. Held *per Holt*, That such an officer put in for life was not removable by a succeeding marshal on the surrender of the estate of the marshal for life, because he could do nothing to defeat his own grant; and that a removal by act of parliament for his own offence was his own act, *Sutton's Case*, 557, 558
3. But as the succeeding marshal is answerable for his prisoners, whether one can be imposed upon him was the doubt, *Sutton's Case*, 558
4. If one by process of *B. R.* be turned over to the marshal, and by *habeas corpus* is turned over to the Fleet; *per Holt*, That shall not hinder declaring against him in *custodia*, *Anonymous*, 560
5. Tipstaff is marshal's officer, and commitment to him is to the marshal, *Anonymous*, 634, 635

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1. When a person is made master of a ship, he has the appointing of the crew; for as he is answerable for all

events, he should have the election of those he can confide in, *Rosier v. Sawkins*, 434

2. Servant or deputy not chargeable as such for neglect, only for misfeasance; but recourse to be to the principal, *Lane v. Cotton*, 488
3. Lieutenant of a man of war may give moderate correction, but not wound, *Anonymous*, 504
4. If a servant usually employed to borrow money, or pawn goods, for the master, do it, debt will lie against the master, *Anonymous*, 564

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1. *Ley merchant* is *jus gentium*, and part of the common law; and the Court ought to take notice of it when pleaded, *Meggadon v. Holt*, 15, 16
2. By bill of lading the property is consigned over, and he may bring action; and the invoices signify nothing, *Evans v. Martel*, 156
3. The captain of a ship insured may be changed without notice to the insurers, *Anonymous*, 325
4. Joint traders are jointly charged, if there be no special agreement, *Anonymous*, 446
5. Factor of common right is to sell for ready money, unless the usage be in such particular goods to sell for credit, *Anonymous*, 514, 515
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7. The remedy against a factor is account; but if he convert goods, trover will lie, *Anonymous*, 602

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1. Where foreign coin is demanded, the action is in the *detinue*, and the averment that the defendant has neither rendered it nor the value, *St. Leger v. Pope*, 81
2. Money allowed to be brought into court in *assumpsit*, because payment goes to the issue; but in trover it goes only to the damages, and not allowed to be brought into court, *Burman v. Shephard*, 90
3. Covenant on three distinct covenants, one of which was for non-payment of rent, refused to let money be brought into court; for when plaintiff has just cause of action, will not oblige him to go to trial for the residue, on peril of costs, *Paulet v. Heathfield*, 95
4. But see *Hallet v. East India Company*, 95 *notis*
5. Guineas are coined at the Mint for 20s. and at that rate are lawful money without proclamation, *Dixon v. Wilbourn*, 100
6. Money may be brought into court on *assumpsit*, but not on a *quantum meruit*, *Smith v. Johnson*, 187
7. See how money came to be brought into court, *Giles v. Hart*, 153
8. Money not to be brought into court on covenant, *Lawley v. Dibble*, 241
9. In debt on a bond for foreign money, declares for so much *English* value, *Brown v. Gullock*, 541
10. If action be brought for foreign money, it is *detinue*, *ibid.*
11. When suit is on a counterbond, or where there is a pretence of a collate-

ral agreement, principal and interest not allowed to be brought into court, *Coke v. Heatbot*, 593

12. Money not to be brought in on *quantum meruit*; but the way is to confess the employing, and that he deserved but so much; and plead a tender; to which plaintiff may reply, he deserved more, and so come to issue, *Anonymous*, 614

13. If a *quantum meruit* and *indebitatus* be in the same declaration, money may be brought in on the *indebitatus*, which will affect the other, *ibid.*

14. But see the modern practice upon this subject, *Hallet v. East India Company*, 614 *note*

15. On bringing money into court, the course is to pay costs so far, if plaintiff will take it out; but if it be such an action that defendant may plead tender in bar of costs, and that plaintiff to cost him of that would reply a special *capias* of a precedent Term, all this may be settled on motion, *Anonymous*, 633

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1. Act made on disbanding the army that soldiers should be free from suit for three years: a soldier cannot be discharged on motion, but must plead the act, *Crouch's Case*, 336
2. *Scire facias* on wrong judgment set aside on motion, *Anonymous*, 351. 391
3. If a custom-house officer be indicted for forgery, the Court will not make a rule to produce the custom-house books, *Anonymous*, 533

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1. Where persons are doing an unlawful act, and murder ensues, it is murder in all, and it is lawful for any one to command the king's peace and suppress them; and such attempt to suppress them is not such a provocation to make killing manslaughter, *Aston's Case*, 256
2. If persons quarrel on a sudden, and for conveniency go out of the Park to fight, and death ensue on this sudden quarrel,

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- Quarrel, it is not murder, *Rex v. Kirk and Cage*, 304, 305
3. Several persons being met to do an unlawful act, one fires a gun and kills one of his own party, it is not murder, not being found he shot at the king's officers, who opposed, *Rex v. Plummer*, 627
4. If it had, had been murder, though killed one of his own party, *Rex v. Plummer*, *ibid.*
5. If one shoot, intending to kill one, and kill another, it is murder, *Rex v. Plummer*, 628
6. In general, if two are engaged in an unlawful act, and a man is killed, all are guilty of murder, *Rex v. Plummer*, 629
7. But if he knew not of the particular malicious design, which was distinct from what engaged in, it is not murder, *ibid.*
8. The act of one, whereby murder follows, must be in pursuance of the original unlawful design, *Rex v. Plummer*, 630
9. If in a fray a constable, not known to be such, is killed, it is not murder, *Rex v. Plummer*, 631
10. If a person in such a fray declare he comes to keep the peace, is killed, it is the same as if he was known to be a constable, having equal power for that purpose, and is murder, *ibid.*
11. But in a riot, if any person be killed in pursuance thereof, all concerned are guilty of murder, *ibid.*
12. The deliberate act ought to be to the hurt of somebody, *Rex v. Plummer*, 632
13. Or if not against a person, yet must be a felonious act, or carried on with a felonious intent; it is murder, else not, *ibid.*

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NISI PRIUS.

1. Ejectment against seven, who all appear, plead, and join issue on the plea-roll; the *jurat.* and *disfringas* were against seven; the issue on the *nisi prius* roll was joined only by five, and verdict against seven: the *nisi prius* roll is amendable, for the Judge had sufficient authority to try the cause, *White v. Bishop of Worcester*, 107
2. The reason why the *nisi prius* is on the *disfringas* is, that the jury may be returned above, and the parties know them, *Anonymous*, 370
3. On information, not guilty pleaded, the defendant at *nisi prius* confessed the action; either no notice should be taken of the *nisi prius*, or should shew the jury were called, *Rex v. C. balner*, 377
4. *Cognovit actionem* may be entered there, *Gree v. Rolle*, 653
5. Pleas *puis darrein continuance* may be recorded there, *ibid.*
6. Day in bank and *nisi prius*, as to pleading, are the same, *Gree v. Rolle*, 654

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2. Nonsuit may lie in Term-time, *Musgrave v. Esfcourt*, 417
3. Prosecutor entered a *non pros.* of indictment of perjury, and that set aside, *Rex v. Cranmer*, 647, 648
4. Judge of *nisi prius* may enter a *retraxit* against one, and proceed to trial against the others in ejectment, *Gree v. Rolle*, 651
5. *Retraxisit*

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5. *Retraxit* is only an agreement not to proceed, and is not a confession of having no cause of action, *Gres v. Rolle*, 653
6. *M. n. prof.* does not amount to a release, *Gres v. Rolle*, 654
8. On information for nuisance, evidence being doubtful, jury to have view by consent, *Rex v. Clerk*, 626
9. Tenant for years erects nuisance, for which damages are recovered, he assigns the term; the nuisance is continued, action may be brought either against him or his assignee, *Rosewell v. Prior*, 635

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1. Must be personal notice before attachment will go for not performing an award, *Anonymous*, 257
2. If servant, who had power to draw bills of exchange in his master's name, draw bills after he was out of his service, if it be so short a time after as the world could not take notice of it, it shall bind the master, *Harrison's Case*, 346
3. When exception is taken to bail, notice should be given to defendant's attorney, *Anonymous*, 435
4. Should be notice of motion to make submission to award a rule of court, *Anonymous*, 525
10. But shall be only one satisfaction; per *HOLT*, *Rosewell v. Prior*, 640
11. Before *Wgt.* 2. c. 24. lay not against the erector after assignment, *Rosewell v. Prior*, 637
12. *Quod permittas* lies only against the tenant of the freehold, *Rosewell v. Prior*, 639
13. Erector is liable for all consequential damages, which he cannot purge by assignment over, *ibid.*
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1. Indictment of nuisance for keeping gunpowder, *Anonymous*, 342
2. But see the statutes on this subject, 342 *notis*
3. There must be apparent danger; and though had been done so for many years, if it be a nuisance it will not make it lawful, *Anonymous*, 342
4. If at the time of setting up the house in which the gunpowder was kept no house were near, but after others built, it is at the peril of the builder, *Anonymous*, *ibid.*
5. A thing that will be a nuisance when completed, yet cannot be abated till it be actually so, *Rex v. Wharton*, 510
6. If the owner of a river neglect to scour it, by which land is overflowed, he is indictable, *Rex v. Wharton*, *ibid.*
7. *Git* of the action in nuisance is the damage; and therefore evidence may be given of consequential damages; not so in trespass, which is one entire act, *Case of the Farmers of Hampstead Water*, 519

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2. Quaker, on demanding surety of the peace, must take the usual oath, *Hibbs v. Byron*, 243
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1. Bond is no satisfaction for money due, though it may be for money before it is due, *Young v. Rudd*, 86
2. Though a bond be in words ever so improper, if the intent of the parties can be collected it shall be good, *Cramwell v. Gransdale*, 103
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| <p>3. Judgment a good plea in satisfaction of a bond, <i>Rouse v. Nerdham</i>, 248</p> <p>4. Bond to sue with effect is not forfeit by suing injunction, <i>Duke of Ormond v. Ireland</i>, 320. 380, 381</p> <p>5. Bond for performance of covenants; plea, that for the breaches he had recovered damages in covenant, no plea in bar, for shews the bond was forfeit, <i>Pierce v. Hutchison</i>, 321</p> <p>6. Obligation to do an impossible thing is single, <i>Wall v. Groves</i>, 418</p> <p>7. Bond for forty <i>liberis</i> good, <i>Holmes v. Barneham</i>, 495</p> <p>8. Bond discharges <i>assumpsit</i> by extinguishment, being of a higher nature, <i>May v. King</i>, 537, 538</p> <p>9. On debt on a bond, plea that plaintiff agreed to accept a bond in satisfaction of the first bond, it is ill, for it is no more than a covenant, and not a release, <i>Baber v. Palmer</i>, 539</p> <p>10. Bond may be satisfaction of the condition of another bond before forfeited; <i>aliter</i> if after, <i>Baber v. Palmer</i>, <i>ibid.</i></p> | <p>to the <i>custos rotulorum</i>, <i>Rex v. Evans</i>, 13</p> <p>4. Clerk of the peace not removable by a new <i>custos rotulorum</i>, for has a freehold in his office, <i>Harcourt v. Fox</i>, 42</p> <p>5. Bond given by deputy to be accountable for half the profits of an office, not being within 5. Edw. 6. this bond is good, not being for a sum certain, <i>Culliford v. Cordonny</i>, 90</p> <p>6. <i>Custos rotulorum</i> may appoint clerk of the peace by parol, <i>Saunders v. Owen</i>, 199</p> <p>7. Parish clerk cannot sue for a salary in spiritual court, <i>Anonymous</i>, 583</p> |
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ORDERS OF JUSTICES OF THE PEACE.

See POOR, APPRENTICE.

1. Order of sessions on appeal is final, though the statute does not expressly say so; and the court of king's bench cannot examine the fact, but only quash the order, if contrary to law on the face of it, *Anonymous*, 20
2. Two justices of the peace removed a poor man from *H.* to *B.* which the sessions reciting, and that he had rented a farm of ten pounds *per annum* at *H.* ordered that he should be settled at *H.*; resolved, that the settlement at *H.* being the place from whence he was removed, is a reversal of the first order, *per* two justices, *contra* *HOLT*, who held, it should have appeared he had been settled there forty days, *Anonymous*, 20
3. It is not necessary to say he rented a house of ten pounds *per annum*; the order must be on complaint of the overseers and churchwardens, else the justices have no jurisdiction, *Rex v. Wootton Rivers*, 89
4. Order made by justices, who are not said to be of the division, good, for the statute is only directory, *Rex v. Ashley*, 138
5. Appeal from order of justices must be to the next general sessions, and not to the next general quarter sessions, *Rex v. Shaw*, 203

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1. Register's officer of *Landaff* may be granted to two; and a judicial office may as well be granted to two as a ministerial, *Jones v. Bean*, 10
2. Clerk of the peace not removable but on misdemeanor, for has a freehold; and articles in writing must be exhibited against him, *Rex v. Evans*, 13
3. The custody of the rolls belongs to the *custos rotulorum*; the making them up belongs to the clerk of the peace, who is a distinct officer, and not a servant

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7. Order made conditional, "if B. R. be of such opinion," quashed, *Grindon v. Overcott*, *ibid.*
8. Sessions can only affirm or quash orders on appeal, and have no power to make an order, *Overcott v. Grindon*, 376
9. B. R. *ex debito justitiæ* is bound to confirm order, if nothing appears why it should be set aside, *Overcott v. Grindon*, *ibid.*
10. In order of justices in adjudication of the reputed father of a bastard child, must appear that one of them was of the *quorum*; and that the examination was by two, *Rex v. Somerton*, 393
11. Order to remove a man and his family ill; so of him and his children, *Rex v. Kirford*, 398
12. When two justices make an order, they may certify it to the sessions; and then the sessions are legally possessed of it, and removable by *certiorari*, *Rex v. Marlborough*, 402, 403
13. Servant hired for a year shall not be removed for being got with child, *Rex v. Marlborough*, 403
14. But see *Rex v. Brampton*, 403. *notis*
15. Both justices in making order must examine, *ibid.*
16. And see the cases cited, 403. *notis*
17. Order of sessions for assessing towards repair of a bridge removed by *certiorari*, 403
18. Justices cannot order a sum of money to be paid for drawing indentures of apprenticeship, but should order a rate to levy so much *per week* till convenient sum be raised, *Anonymous*, 417
19. Order confirmed on appeal is conclusive, *Rex v. Longcreechill*, 419
20. Sessions may originally make order for discharging apprentice, and may order master to refund part of the money; it must appear that master was summoned, *Rex v. Dillon*, 498
21. See also *Rex v. Johnston*, 553
22. If order of justices be quashed in B. R. the order of sessions falls, *Anonymous*, 548
23. If order of justices be confirmed on appeal, the appellants are concluded, *Anonymous*, *ibid.*
24. Five justices should not join in an order of sessions; *per Holt*, *Anonymous*, 559
25. Sessions quashed an order of justices, and before the poor person comes back justices make a new order, it is ill, *Godstone v. Grindstone*, 633
26. To remove a person, must be adjudication is likely to become chargeable, *Halfstead v. Melford*, 667
27. Order to remove wife and children to the last settlement of the husband ill, for children might have another settlement, *Halfstead v. Melford*, *ibid.*
28. Order confirmed on appeal is final to that parish; so if it be not appealed from, *Rex v. Minton*, 668

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Donative is exempt from the ordinary's jurisdiction; yet the clerk of it may be punished by ecclesiastical censures, but not to deprivation, *Finch v. Harris*, 640, 641

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OUTLAWRY.

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1. Persons outlawed for felony, Court cannot give judgment against them, unless are present, it being for a corporal punishment, *Rex v. Harrison and Duke*, 156
2. The cattle of a stranger *levant* and *couchant* on land extended on an outlawry may be taken by a *levari facias*, *Britton v. Cole*, 175
3. If an outlawed person, before inquisition, alien, it prevents the king's pernanacy of the profits; *aliter* if the alienation be after inquisition, 176
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5. Not saying *pro com.* an exception, *Anonymous*, 337
6. When cause of action accrues at a time a person is outlawed, plea of outlawry overthrows the writ, and after removal of outlawry must begin *de novo*; but where the disability comes after the cause of action accrued, the plea of outlawry is only a temporary disability, and does not abate the writ, but only *quousque*, *Lady Falkland v. Stanion*, 400
7. If a person who is visible be outlawed, the outlawry shall be reversed at the charge of the plaintiff, *Hill v. Wilks*, 413
8. By outlawry a lease for years is forfeit before seizure; and if sold before seizure the king shall avoid the sale, *Anonymous*, 438
9. Feme covert outlawed without baron discharged on motion, *Sarah Griffith's Case*, 444. 445
10. Outlawry of treason reversed, not saying where the court was held, *Rex v. Yeates*, 542. 544
11. Before outlawry for murder be reversed, a *scire facias* must go to all the lords mediate and immediate, or attorney general must confess on record that there are no lands or tenements, *Rex v. Young*, 544. 545
12. See also *Rex v. Bishop*, 626. 668
13. In error to reverse outlawry for matter of law, need not give bail to the original action, as must for want of proclamations, *Wilbraham v. Doley*, 545
14. Special bail to reverse outlawry is to answer condemnation; other special bail is, or to render body to prison, *Wilbraham v. Doley*, 545. 546

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1. The stile of the justices in *Durham* is always itinerant, and there there is no great sessions, *Lamb v. Jenison*, 181
2. If person be in custody of marshal for cause, he may be proceeded against for matter arising within county palatine, *Wilbraham v. Lownds*, 535

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P A R D O N.

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2. If the king grant away his fines, that does not extinguish his power of pardoning, for that is inseparably annexed to him, *ibid.*

PARISH, TOWN, VILL.

1. Parish may tax themselves to carry on a suit for the good of the parish; but in such rate the majority will not bind the rest, as in case of other rates, *Rex v. Everard*, 440
2. A chapel's having sacramentals only will not make it independent of the parish, *Anonymous*, 504
3. Vill and village are the same; a hamlet is a division of a vill; the whole vill is a constabulary, *Anonymous*, 546

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See PRIVILEGE.

1. If member of parliament sue one at law, he may be brought into equity without breach of privilege, *Anonymous*, 343
2. Writ of error *ad proxi. sessionem parliamenti*, and before that time it be dissolved, and day fixed for a new one, whether it be a *superfedeas* of execution, *Peters v. Benning*, 604

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3. If proceedings be on impeachment, and then the parliament be dissolved, may proceed in another parliament, *Peters v. Benning*, 605
4. If Term intervene between a prorogation, execution may be, by the opinion of HALE and KEELING, *ibid.*
5. If writ of error be left in the lords, and there be a dissolution, execution may be taken out; but the writ of error is not discontinued, *ibid.*
2. Jointenancy must be pleaded in abatement, and cannot be pleaded in bar, *Kemp v. Andrews*, 3
3. *Touts temps priſt* cannot be pleaded after imparlance; but on a bond after imparlance, tender may be pleaded, and *uncore priſt*, *Anonymous*, 6
4. *Hoc parat. eſt verifcare* only form, *Morley v. Vivian*, 38
5. Plea in bar, that he was administrator, and not executor, ill, *Harding v. Salkill*, 46

PARSON, VICAR, AND CURATE.

1. The freehold of the church is in the parson, and no one can preach in it without his leave, *Turton v. Reynolds*, 433
3. None can preach without licence of the ordinary, which he ought to grant *ex debito justitiæ* to one who is fit; but if will not do it, the remedy is appeal, not *mandamus*, *Turton v. Reynolds*, *ibid.*
6. Writ of error depending in exchequer chamber, no plea in debt on a judgment, *Anonymous*, 48
7. Plea, that the indorsee was a bankrupt at the time of indorsement, good plea; but must plead that a commission was taken out, *Baker v. Goodwin*, 50
8. Plea that he was administrator, and not executor, *unde petit judicium quod, &c. non responderi debeat*; this would have been a good plea in abatement if properly concluded, which should have been *quod billa caſſetur*; not being so, it is ill, *Bower v. Coke*, 87

P A W N S.

See PLEDGES.

PEACE, SURETY OF,

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PEERS OF THE REALM.

1. Indictment for murder by the name of C. K. pleads in abatement *misnomer*, and that he was Earl of Banbury; and held good plea, *Rex v. Knowles*, 55
2. In civil actions the recognizance is entered into by the bail only; and so no estoppel to a defendant's peerage, *Roberts v. Villars*, 217, 218
10. Another action, pending for the same cause, may be pleaded *procurat. pates per recordum* before the original filed, or issue entered on record, *Armitage v. Row*, 91
11. In all cases where a person admits the action, were it not for some special matter, that may either be specially pleaded, or given in evidence, *Haffy v. Jacob*, 97
12. In special pleading, wherever the defendant sheweth a cause of action in the plaintiff, either express or implied, and confesseth and avoideth it, it is a good plea; but without allowing a cause of action, it amounts to the general issue, *Hallet v. Birt*, 121
13. Foreign plea must be sworn to, but a plea to the jurisdiction is not a foreign plea,

P E R J U R Y.

1. Where a thing is expressed with certainty before, an *innuendo* may relate to it, and explain it; else not, *Rex v. Greiffe*, 139
2. In swearing off a contempt may be perjury, *Rex v. Sims*, 511

P L E A S A N D P L E A D I N G.

1. Where a thing may be pleaded in abatement, that shall not be assigned for error, *Cong v. Bowles*, 1

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- plea, and so need not be sworn, *Cholmley v. Bloom*, 123
24. If *alien-nes* is pleaded in bar the place of his birth must be shewn; if in abatement, it is triable where the action is brought, *Ord v. Howard*, 125
25. When outlawry is pleaded in abatement, a *capias*, or some such thing, must appear; and not conclude *prout patet per recordum*, as when it is pleaded in bar, *Anonymous*, 132
26. Wherever an action is commenced by bill, praying judgment of the count is a plea in bar; and in case of plea in abatement of the count, must not pray judgment of the count, and that the count may be quashed, but that the bill may be quashed, *Leaves v. Bernard*, 133
27. Variance between the writ and the count cannot be pleaded without craving *oyer*; for though it be in court, it is on a distinct roll from the count, *Bragg v. Digby*, 189
28. Action pending in inferior court no plea in bar to action brought in superior court for the same cause, *Brinsly v. Gold*, 204
29. Plea of other action pending in *C. B.* not supported by action discontinued, *Marley v. Blunt*, 307
30. If in bar defendant fail of giving colour where necessary, that may be remedied by the plaintiff's replication, *Anonymous*, 316
31. If one come in on a *cepi corpus* in custody, he must plead *instante*; *aliter* where he has been bailed, and come in on the *cepi*; *sed per Holt*, there is no reason of the difference, *Anonymous*, 372
32. It is no true rule, that where the defendant may plead the general issue, and give the special matter in evidence, he shall not plead specially, *Paramour v. Johnston*, 376, 377
33. Wherever matter in law, which avoids the cause of action, may be pleaded generally; and that given in evidence, that may be pleaded specially, *Paramour v. Johnston*, 377
34. On all general issues, special matter may be given in evidence, if colour be given. 377
35. If one is bound to save harmless against a particular thing, defendant should shew how he has done it; but if it be to save harmless generally, *non damnificatus* will do, *Anonymous*, 406
36. If the plea be ill, and breach is ill assigned by replication, plaintiff shall not have judgment, *Anonymous*, 407
37. Where there is matter in bar to be pleaded, and omitted, it shall not be given in evidence, *Rook v. Sheriff of Salisbury*, 412
38. Where bond is given for doing a thing which lies in demand, the bond is not forfeit till demand; of which the defendant must take advantage by pleading *semper paratus*. If he should plead performance generally, and plaintiff assign breach, defendant cannot rejoin want of demand, for that would be departure, *Levin v. Randall*, 413, 414
39. If on *scire facias* returned, defendant do not plead what he may have in discharge, he loses the advantage of it, *Anonymous*, 441
40. If one be to plead in bar in *Michaelmas*, *craft. Animarum* will do; *aliter* if in abatement, *Anonymous*, 442
41. Either general issue should be pleaded, or colour be given, *Saunders's Case*, 513, 514
42. Where *respondens ouster* is awarded, where judgment final should have been, it is not error, being for plaintiff's advantage, *Slanney v. Slanney*, 525
43. If plea begin in abatement, and conclude to action, it is ill, if plea in bar be not sufficient, *ibid.*
44. If plea commence in bar with good matter, and conclude in abatement to the writ, it is well, *ibid.*
45. In plea amounting to the general issue, colour should be given, *May v. King*, 537
46. After attorney made and entered on record, cannot plead there was no such

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- such person as the plaintiff, *Bail v. Smith*, 539
37. Term cannot now be assigned without writing, but need not be so pleaded, but to come in evidence, *Birch v. Bellamy*, 540
38. But wills of lands being created by act of parliament, all the circumstances must be set forth, *Birch v. Bellamy*, 540, 541
39. On debt on a bond, payment of part *quis darrein continuance* may be pleaded in bar, *Pearce v. Packstone*, 541, 542
40. But not so in contract, because may be given in evidence, *Pearce v. Packstone*, 542
41. On pleading a deed, and *profect* of it, it remains in court all the Term; but letters of administration do not, *Roberts v. Arthur*, 598, 599
42. When a plea begins with a *quoad*, it must be restrained to what that refers to, *Vincent v. Preston*, 603, 604
43. Plea in bar is good to a common indent, *Vassor v. Edwards*, 663, 664
44. Replication must have a general certainty, *Vassor v. Edwards*, 665
3. Service of a year by two different contracts, is a good service for a year to gain a settlement, *Bridget Bailey's Case*, 224
4. If overseers of poor be convened before two justices to account, the remedy is to appeal to the sessions, *Anonymous*, 251
5. Vagrant sent to the place of his birth, may be sent to the place of his last legal settlement, *Anonymous*, 319
6. A child follows the settlement of its parents, unless he gain a distinct settlement. Ideot, since 1. *Jac.* 2. follows the father's settlement, *Anonymous*, 322, 323
7. Poor person sent by order of justices from *A.* to *B.* which order was quashed on appeal, does not hinder the parish of *A.* from sending him to other place of settlement, *Rex v. King's Bowsey*, 323
8. Spiritual court cannot make a rate themselves, but can excommunicate the parish for not doing it, *Blank v. Newcomb*, 327
9. Poor person removed by order of justices to *Oxfordshire*, the justices there remove him to *Berkshire*; the first order is conclusive till reversed on appeal, *Rex v. Shippingfarrington*, 370
10. Though *B. R.* will not affirm an order, are not obliged to quash it, *ibid.*
11. Settlement of father is so of child, *Spitalfields v. St. Andrew's*, 383
12. No notice requisite of a servant's coming into a parish to gain a settlement, *Anonymous*, 441
13. When overseer contracts debts on account of the poor on his own credit; when he receives poor's money sufficient, it is his own debt, *Anonymous*, 559

PLEDGE AND BAILMENT.

A man may have debt for money due to him, notwithstanding his having a pawn, *Anonymous*, 564

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See JUSTICES OF THE PEACE, ORDER OF JUSTICES, APPRENTICES.

1. A boy put out for a year to learn to shave and make wigs, on covenants entered into, to which the boy was no party, gains no settlement, *Rex v. Jerison*, 132
2. Sessions may set aside a poor's rate, and make a new one themselves, or order one to be made by the churchwardens, &c. *Rex v. Shoreditch*, 212

P O W E R S.

1. Power to make leases, except the demesne lands of the manor; under this copyhold land cannot be let, being parcel of the demesne of the manor, *Winter v. Lovedarr*, 147, 148, 149
2. Where

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2. Where a power is given, and after comes a qualification of the power, which is not as extensive as the power, that part of the power may be executed without pursuing the qualification, *Winter v. Lovedurr*, 151

P R E S C R I P T I O N.

Vicar claimed a stipend by prescription, ill; for none but a corporation or body politic can prescribe, *Birch v. Wood*, 249.

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P R I V I L E G E O F P E R S O N S.

See ATTORNEY.

1. In an action *qui tam*, privilege may be pleaded, and he may plead in the negative, without making a full defence, *Kirkham v. Whealey*, 74
2. Where it appears in pleading that a person is actually in custody, he cannot have privilege, *Duncomb v. Church*, 102
3. Privilege of parliament does not protect a man where security of the peace is desired, *Rex v. Culpepper*, 108
4. Being in custody of the marshal, on bail filed, does not hinder an attorney of his privilege, unless he be in actual custody, *Stens v. Bodiner*, 112, 113
5. Bill cannot be filed against an attorney in Vacation; it must be *sedente curia* the last day of the Term; if attorney and other are joined, he loses his privilege, and both must be declared against in custody, *Broadwait v. Blackerby*, 163, 164
6. If officer plead his privilege by writ, his being an officer cannot be denied, *Anonymous*, 181
7. Any plea of privilege may be to a declaration against one in custody of marshal, if he be wrongfully there, *Wilbram v. Lownds*, 535

8. If attorney be *in custodia maris* for want of bail, or if puts in bail, it shall not hinder him of privilege; because cannot plead it till bail, *Wilbram v. Lownds*, 535, 536

P R I V I L E G E O F P L A C E.

1. In case of exempt jurisdiction pleaded, must shew have jurisdiction of the matter, and that the cause arises within it, *Duncomb v. Church*, 102
2. Temple no privileged place; nor can any exemption be good without setting up a jurisdiction to do justice; but bailiffs should not come to execute process there; if they do, the way is to submit to the process, and the Judges will lay them by the heels, *Brown v. Borlace*, 155, 156

P R O H I B I T I O N A N D C O N S U L T A T I O N.

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1. Prohibition to the spiritual court, on a suit there for words, not to be granted after sentence, *Coke v. Hawkins*, 13
2. Suit in spiritual court to annul an incestuous marriage, pending which one of the parties dies, prohibition shall go *quoad* annulling the marriage, *Hicks v. Harris*, 35
3. Prohibition *quoad* answering on oath in a suit for adultery, *Anonymous*, 40
4. Prohibition to spiritual court on suit there to deprive a chancellor, *Jones v. Bishop of Landaff*, 47
5. Prohibition may be to the spiritual court after sentence, if it appears on the face of the proceedings that have no jurisdiction; else not, *Chicklam v. Dickson*, 132
6. If it appear on the face of the proceedings, that the admiral has not jurisdiction, may be prohibited at any time, *Rat v. Broom*, 134, 135
7. Prohibition to grand sessions, who subpoenaed a man who had an estate within the jurisdiction, but lived out of it, *Trantor v. Duggan*, 138, 172, 173
8. On

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8. On suit for tithes, suggestion of a *moiety*, the suggestion must be proved; else a prohibition, *Gardener v. Booth*, 196
9. Where it does not appear on the libel or proceedings, that the spiritual court has not jurisdiction, no prohibition shall be after sentence; but if it does, it shall, except in case of suing out of the diocese, which must be taken advantage of before sentence, *Pool v. Gardner*, 206, 207
10. Libel in spiritual court for calling a woman "whore," and saying she "kept a bawdy-house," being after sentence; not to be prohibited, *Anonymous*, 236
11. A man living out of a diocese may be cited for subtraction of tithes within it, being not within 23. *Hen. 8. c. 9.* 252
12. Cannot sue in spiritual court for anything, where custom is denied, but person, *Machil v. Malton*, 260. 397
13. Motion for prohibition to the chancellor, *Dair v. Earl of Stamford*, 313
14. Suit may be in spiritual court for fraudulently taking away a will, which had been proved there, not prohibited, *Dear's Case*, 325
15. Suit in spiritual court for a mortuary if custom be not denied, *Olāham v. Righson*, 326
16. Spiritual court cannot make a rate, but excommunicate for not doing it, *Blair v. Newcombe*, 327
17. All controversies concerning seats in the church determinable before the ordinary, unless where seat claimed by prescription, *Anonymous*, 401
18. Suit by a vicar, claiming a duty by prescription, for finding a person to officiate at a chapel of ease, *Stene v. Jones*, 404
19. Prohibition on a libel for a parish rate for mending an organ, *Anonymous*, 416
20. No prohibition on suit for a mortuary if custom be not denied by plea, *ibid.*
21. Suit may be in spiritual court against a woman for incontinency after the death of the man, though she suggested a marriage, *Anonymous*, 419
22. See also *Hemming v. Price*, 432
23. Marriage *de facto* not to be avoided after death of a party, *Hemming v. Price*, *ibid.*
24. In prohibition, either of the contending parties may be plaintiff, *Anonymous*, 423
25. Though it appear on the face of the libel, that the spiritual court has no jurisdiction, will not grant prohibition without suggestion, *Blaxton v. Hours*, 435
26. Prohibition may go to a pretended court, *Anonymous*, 445
27. If declaration be by him who sued prohibition, and no plea in due time, judgment may be by *nihil dicit*; but if on the other side, consultation, *Furze v. Rainier*, 447
28. Suit in spiritual court for salary of a parish clerk, prohibited, *Anonymous*, 583
29. Libel in spiritual court for cohabitation with a woman, who for a considerable time, and to the day of the citation, lived within the diocese; motion for prohibition, on suggestion she lived out of the diocese, refused, *Farnwick v. Lady Grosvenor*, 610

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P R O P E R T Y.

1. Property of things *feræ nature* is in the owner of the soil, while they are there, *Sutton v. Moody*, 144
2. If a man start game in his own ground, and kill it in another's, it is his by reason of the first starting, *Sutton v. Moody*, 145
3. By bill of lading the property is assigned, and he may bring action, and the invoices signify nothing, *Evans v. Martell*, 156
4. By receiving money, and putting it into a bag, the property is altered, and

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and detain will lie for it, *Carter v. Shephard*, 189

5. *A.* employs his father to buy goods for him, which he does, and pays part of the money; the property is in the father, and a subsequent bill of sale to the son will not divest the property, *Anonymous*, 344, 345
6. Earnest does not alter the property, but only binds the bargain, *Anonymous*, 345
7. Sale of goods in a shop out of London does not alter the property; nor even there, if felon be convicted on owner's evidence, *Anonymous*, 521

appears that he did, the execution is void, *Pullen v. Purbeck*, 355

2. And if that appear on the face of the record, it is *ipso facto* void, and needs no judgment or *audita querela* to avoid it; as it would if it did not appear on the return, *Pullen v. Purbeck*, 368
3. If on *elegit* return be, that has no lands, may have new execution; but if any lands are found, is concluded, *Pullen v. Purbeck*, 357
4. Appearance on recognizance for keeping the peace never discharged till the end of the Term, unless attorney general comes in and desires it, *Rex v. Foster*, 448
5. Debt on recognizance said *deberi* is well, *Beech v. Trewors*, 600

Q.

QUANTUM MERUIT.

Where two promises are laid, one well and the other ill, one shall not vitiate the other; unless it appears to be for the same thing, shall not be so intended, *Wesk v. Cole*, 157

QUARE IMPEDIT.

Two jointenants of advowson made partition to present by turns; one granted over his share, the grantee may alone bring *quare impedit*, *Philips v. Bishop of Salisbury*, 321, 322

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R.

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RECOGNIZANCES, STATUTES, ELEGIT, &c.

1. In execution on *elegit* the sheriff must deliver no more than a moiety; if it

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1. Plea in abatement, and judgment thereon, should be entered on the issue-roll, and not to make two rolls, *Dabarton v. Chancellor*, 189, 190
2. On *nul tiel record* pleaded, a day is given to bring it in, *Moor v. Manufacturers of Garrett*, 214
3. If bail be personated, record may be vacated, *Beckman's Case*, 257
4. *Scire facias* against bail, who pleads no *captias* issued; plaintiff replied there did, *prout patet per recordum*; ill, *Grant v. Burton*, 267
5. If record be pleaded, it must be shewn where it is, *Anonymous*, 318
6. When a record of the same court is pleaded, the replication must be either *nul tiel record*, or crave *oyer* of it, and not join issue on it; if it be of another court, may reply *nul tiel record*, and day is given to bring it in, *Creamer v. Wickett*, 350, 351

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1. If tenant gain the freehold any time before judgment, it is good, *Lacy v. Williams*, 261
2. Rent-charge to *A.* in tail, remainder to *B.* in tail; *A.* suffers recovery and dies without issue, the remainder is barred, *Anonymous*, 513

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RELEASE AND DEFEASANCE.

1. Two deeds made at the same time, and not having reference to each other, not to be construed defeasances, *Clayton v. Kynaston*, 221
2. Record of judgment is defeazable by bond or deed, *Anonymous*, 229
3. *Not prof.* against one defendant, is no release as to the rest, *Rex v. Serjeant*, 320
4. Release does not discharge a note given the same day, *Anonymous*, 401
5. If covenantor covenant to save covenantor harmless, it is a defeazance of the covenant, *Lacy v. Kynaston*, 415
6. Where a thing is to be done on a condition precedent, release of all demands given before condition performed; does not discharge it; for before that it does not lie in demand, *Thorpe v. Thorpe*, 455, 460
7. Where are mutual promises, release will bar action before performance, *Thorpe v. Thorpe*, 459
8. Indenture made by *A.* and *B.* to save *C.* harmless, is not a defeasance of a covenant wherein *A.* is bound to pay *C.* a sum of money, *Lacy v. Kynaston*, 528
9. If a defeasance be to one of the parties, it is so to all, *Lacy v. Kynaston*, 550
10. Where it may be collected deed intends mutual remedies; it shall not be construed a defeazance, *ibid.*
11. Defeazance is, that when the condition be performed, the thing defeazanced shall cease, *ibid.*
12. If *A.* and *B.* be jointly and severally bound to *C.* and covenants not to sue *A.* it is not a defeazance, *Lacy v. Kynaston*, 551, 552

REMEDIES.

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RENDER.
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RENTS.
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REPLEVIN, AVOWRIES AND HOMINE REPLEGIANDO.

1. In a *homine replegiando* must plead *in fieri*, without imparlance, *Anonymous*, 9
2. In a *homine replegiando*, if the party appear on the day of the return of process, and pleads *non cepit*, *superfideas* shall go to the *quithernam* without bail, *De La Bastile v. Reignald*, 36
3. Avowry was only for part of a rent; how the rest was satisfied must be shewn, *Johnston v. Baynes*, 84
4. Bailiff or not, traversable in replevin, *Trevilian v. Paine*, 97
5. It is doubtful whether hundred court can hold a plea of replevins; but if may, it must be in court, *Hall v. Birt*, 120
6. Property in a stranger a good plea in bar, *Parker v. Meller*, 111
7. Whether in avowry or rejoinder a title must not be set forth, *Chalmer v. Clayton*, 188
8. In avowry, whenever title is made under a particular estate, the commencement of it, and the original whence it is derived, must be set forth in pleading, *Silly v. Dally*, 196, 197
9. Whether in avowry for a rent-charge all the lands charged should not be named; and not with an *inter alia*, *Orby v. Pullen*, 319
10. In avowry as bailiff for rent, his being bailiff not traversable, *Goudier's Case*, 321
11. In replevin, bringing money into court on tender of rent is superfluous, for money is not demanded, but whether distress be well taken; *aliter* in debt on bond, *Horn v. Luines*, 352
12. In tender of rent on avowry, *obitus* is necessary, and *paratus* not sufficient, *Horn v. Luines*, 353
13. Replevin

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13. Replevin and *alias* are not returnable, but the *pluries* is, *Freeman v. Bluet*, 397
14. If appearance be entered before *elongat.* returned, no *withernam* should go, *More v. Watts*, 425
15. *Withernam* is the process on the *elongat.* returned, *ibid.*
16. *Non cepi* may be pleaded on the *elongat.* returned, and then need not give bail; but if pleads *non cepi* on the *withernam*, he must, *ibid.*
17. The bail must be in a sum certain, and in nature of gage deliverance, *More v. Watts*, 426
18. *Non cepi* may be pleaded on return of *withernam*, *ibid.*
19. If cattle be taken in *withernam* by way of execution in replevin, the plaintiff has property in them; but not where it is only a process, *More v. Watts*, 428
20. If the issue be against one who is bailed in *withernam*, he is to be again in custody, *ibid.*
21. If against one who appeared on the *elongat.* returned, and pleaded *non cepi*, *withernam* shall go, *More v. Watts*, 428. 429
22. By appearing and pleading on the *withernam*, all proceedings stay till issue determined, *ibid.*
23. Are demandable on the return-day, *ibid.*
24. In *pluries* replevin, there is a day in court, *More v. Watts*, 430
25. If plaintiff is demanded, and will not declare, shall be nonsuited, *More v. Watts*, 431
26. Where the writ is against several, must declare against those who appear, and continue process against the others, *ibid.*
27. On removal of replevin by *certiorari* out of inferior court into *B. R.* the declaration cannot be changed, *Anonymous*, 453
28. Whether second deliverance be a *superfedeas* of writ of enquiry, *Pratt v. Rutleis*, 546

REQUEST AND DEMAND.

Where bond is given for doing a thing which requires a demand, the bond is not forfeit till demand; and the defendant must take advantage of want of demand, by pleading *semper paratus*, *Jewins v. Randall*, 413, 414

RESCUE.

1. Cannot be retidned on writ of execution, *Anonymous*, 10
2. Rescue returned, said to be out of the hands of bailiffs, good, *Rex v. Giles*, 94
3. On *rescous* returned, attachment goes of course without motion, *Anonymous*, 247
4. *Rescous* returned is not traversable, *Tracy's Case*, 556, 557

RESTITUTION.

1. On reversal judgment is, that the party be restored to whatever he had lost; and suggestion should be, that he was seized of such lands, and a *scire facias* be taken out against the tenants, who may shew cause against restitution, *Dilken v. Walcot*, 497
2. On inquisition of forcible entry quashed, restitution is not of course, *Anonymous*, 423

RETURN OF WRITS.

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1. To make *capias* returnable the same day summons is returnable is error, *Bidolph v. Veal*, 523
2. Fifteen days not necessary to return of a process in a franchise, *Bidolph v. Veal*, 524

REVOCATION.

Action brought by principal is revocation of letter of attorney, *Anonymous*, 499

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RIOTS, ROUTS, AND UNLAWFUL ASSEMBLIES.

1. Where the inquisition is on view, the sheriff must be present; and though the

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the statute appoints it shall be within a month, under a penalty, that is only mandatory, and may be after, *Rex v. Page*, 123

2. If all except two indicted for a riot are acquitted, no judgment can be; but if it was *cum multis aliis, aliter*, *Rex v. Sudbury*, 262

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RULES OF COURT.

1. Second *scire facias* shall not be taken out till the day of the return of the first, *Anonymous*, 94
2. If a man surrender himself on a judgment given against him, and he be not charged within two Terms after judgment, he shall be discharged on common bail, on producing a certificate from the clerk of the errors, that there is no writ of error depending, *Anonymous*, 132
3. Peremptory rule not to be without notice, *Anonymous*, 251
4. All deeds to be enrolled on the plea-side, and acknowledged in the face of the Court, *Regula Generalis*, 321
5. In debt against bail the principal may be surrendered, as on *scire facias*, on two *nihil*s returned, *Watt's Case*, 351

RULES OF LAW.

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S.

SCIRE FACIAS.

1. *Scire facias* was sealed and delivered after the party's death; and held execution thereon good; and that the statute of 29. Car. 2. c. 3. is only to be understood of the goods of a purchaser, purchased before the delivery of the writ, *Dr. Needham's Case*, 5

2. No writ of error lies on a *scire facias* in the exchequer chamber, on a judgment affirmed there, *Hartop v. Holt*, 165

3. Bail pleads payment before the return of the second *scire facias*, and held ill; for the recognizance is forfeited before suing out the first, *Comier v. Bail of Rawlins*, 112

4. In *scire facias*, it is sufficient if there be fifteen days inclusive between the 15th of the first and the return of the second, *Goodwin v. Beakbane*, 215

5. In *scire facias quare executio non*, the plaintiff in error may assign error; which if he do, the judgment is only that execution be awarded, *Anonymous*, 231

6. Where on a *capias*, and *cepi corpus* returned against one, another dies, and he in execution escaped, the *scire facias* ought to suggest the escape; and ought to be *de terris et tenementis* of the deceased, and *de terris tenementis bonis et catallis* of the survivors, *Anonymous*, 254

7. On restitution awarded on reversal of judgment, *scire facias* should go against the terre-tenants, *Dillon v. Haden*, 427

8. In *scire facias* on ejectment the original title may be controverted; *aliter* on a judgment in debt, *Anonymous*, 499

9. If writ of enquiry be not executed within a year, there must be a *scire facias*, *How v. Allen*, 500

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SEATS IN CHURCH.

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SESSIONS, GENERAL AND QUARTER.

See ORDERS OF JUSTICES.

1. May be a trial at the same sessions, if there be an adjournment, so as there may

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- may be fifteen days between the *teste* and the return, *Anonymous*, 50
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3. If there be a deed to levy a fine at such a time to such persons, a fine so levied shall not be averred to be to other uses by any writing which is not a deed, *Jones v. Morley*, 160

4. But if the fine vary in any particular from the deed it may; but if nothing appears to the contrary, the fine shall, in construction of law, be to the uses of the deed, *Jones v. Morley*, 160, 161

5. Where a fine varies from a precedent deed, no parties are estopped to aver it was to other uses: but in case of a subsequent deed, declaring the uses of a precedent fine or recovery (though strangers before the statute of Frauds might), the confisor or recoveror, or their heirs, cannot aver it was to other uses, being estopped by their deed, *Jones v. Morley*, 161

6. If a use be declared on a transmutation of possession, as in a fine or feoffment, there needs no agreement; but if it do not arise by transmutation of possession, there must be some consideration or agreement, 161

7. On bargain and sale, the use would arise on payment of the money by parol without deed, *Jones v. Morley*, 162

8. But if it be in consideration of blood, would not arise by parol without deed, for that is no consideration to compel the execution, but must arise by deed, *ibid.*

USURY, EXTORTION, AND BARRETRY.

1. Usurious contract pleaded in bar of debt on a bond, not saying defendant was indebted to plaintiff at the time of the bond, *Crow v. Brown*, 385

2. Bail to the action may plead usurious contract, *Anonymous*, 493

3. In usurious contract, the whole proof lies on the defendant, *Anonymous*, 517

4. In indictment for barrettry, defendant should have copy of the articles to be insisted on, that may have time to prepare for defence, *Rex v. Ward*, 516

W.

W A G E R o f L A W.

1. On debt on a by-law, wager of law will not lie, *City of London v. Wood*, 669

2. Where wager of law is instead of concluding to the country, judgment final, *City of London v. Wood*, 676

3. Wherever a man is charged with a penalty for a wrong done, it lies not, *City of London v. Wood*, 677

4. Plaintiff on bringing witnesses, and averring *Magna Charta*, may compel the defendant to wage his law, *City of London v. Wood*, 679

5. Secrecy.

A TABLE OF PRINCIPAL MATTERS.

5. Secrecy is the reason of wager of law, so will not lie on a by-law, which is notorious, *679*
6. Lies on account against receiver, for money received by the plaintiff, not by another, *ibid.*
7. In account against bailiff of a manor will not lie, because notorious, *City of London v. Wood,* *681*
8. *HOLT* doubted whether it would lie on judgment in court baron for an amercement, *ibid.*
- entering a *non prof.* as to them, they are good witnesses, *Anonymous,* *40*
2. Witness who had suffered infamous judgment, not for a crime *sua natura* infamous, doubted whether good evidence; but the act of pardon gives him new credit, *Rex v. Crosby,* *71*
3. On usurious contract the bond is part of the crime, and party not to prove it, *Rex v. Warden of the Fleet,* *339*
4. Witnesses may be admitted out of necessity; as on the statute of Hue and Cry the person robbed may, *Rex v. Warden of the Fleet,* *340*
5. A person prejudiced by a will admitted to prove it forged, *ibid.*
6. If disability arise by act of parliament, and be part of the judgment, the king cannot pardon; but if it be only consequential, he may, *ibid.*
7. Burning in the hand does not impeach the credit of a witness, unless the crime for which it was affects it; as if it be for stealing, *Rex v. Warden of the Fleet,* *341*
8. Attorney cannot be a witness in respect of a cause where he had been concerned; against the opinion of *HOLT*, who held he ought to declare any thing he knew not as attorney, *ibid.*
9. In an action on a bill of exchange, the drawer of the bill of exchange was not admitted a witness to prove he did not draw it, *Anonymous,* *345*
10. Person claiming the like interest with that in controversy, though under a different title, no witness, *Case of the Farmers of Newgate Market,* *372*
11. Person not suffered to discredit a witness of his own calling, *Adams v. Arnold,* *374*
12. On suit by creditor against executor, legatee admitted to prove assets, *Anonymous,* *385*
13. Depositions of a witness taken before a Judge, and cross-examined, not to be read, if the party might have had him at the trial, *Anonymous,* *493*
14. Party

W A G E S.

See MASTER and SERVANT.

W A R R A N T Y.

1. Collateral warranty was for the security of purchasers, and of those who were in by title at common law; at which time there was no need of lineal warranty, *Anonymous,* *512*
2. Common recoveries not on the supposal of recompence, but as being never within the statute; *per HOLT,* *ibid.*

W I L L S.

1. If the testator might see the witnesses subscribe, though did not actually, it is a good subscription in his presence, within the statute of Frauds, *Day and Nichols v. Smith,* *37*
2. *Per HOLT*, Probate is sufficient proof of a will, *Rex v. Rains,* *136*
3. A will of a personal estate made before marriage, presumed to be revoked by a subsequent marriage, *Lugg v. Lugg,* *236*
4. Devisee no good witness to a will, *Hilliard v. Jennings,* *276*
5. But see now 25. Geo. 2. c. 6. and the case cited, *277 notis.*

W I T N E S S E S.

See EVIDENCE.

1. If there be several defendants in an information, some of whom have not pleaded, on the Attorney General's

A TABLE OF PRINCIPAL MATTERS.

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| <p>4. Party oppressed good evidence on indictment for the oppression, <i>Anonymous</i>, 512</p> <p>15. Whether thief be a good witness to prove the receiving goods stolen, knowing them so, <i>Rex v. Cross</i>, 520</p> | <p>out a <i>colloquium</i> of his trade, <i>Bennet v. Wells</i>, 420</p> <p>5. "He has nothing but rotten goods in his shop," and <i>colloquium</i> of his trade; actionable, <i>ibid.</i></p> <p>6. To say to a milliner, "Thou art a beggarly fellow, and not worth a groat," actionable, without special damage, <i>Simpson v. Barlow</i>, 591</p> <p>7. Cause for calling a woman whore, by which she lost her marriage, will not lie, without shewing who the person was, <i>Wetherell v. Clarkson</i>, 597</p> <p>8. Where words are only actionable in respect of the special loss, that must be set forth in certain, for it is issuable, <i>ibid.</i></p> <p>9. "Thou art a pocky whore," actionable, <i>Clifton v. Wells</i>, 633</p> |
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W I T H E R N A M.

See REPLEVIN.

WORDS SUABLE IN THE SPIRITUAL COURT, OR NOT.

See PROHIBITION.

1. Calling a clergyman knave, not, *Nelson v. Hawkins*, 104
2. Calling a clergyman blockhead, not suable there, *Coxeter v. Parson*, 231
3. Calling a woman "whore, and pocky" "whore," not suable there, for action lies at common law, *Grimes v. Lovel*, 242
4. Suit for calling a woman whore, suggested to be spoke in London, prohibited, *Tofen v. Skipper*, 495

WORDS ACTIONABLE AT LAW, OR NOT.

1. Saying a woman had a bastard to hinder her of her marriage with A. which was then in agitation, not actionable, *Byron v. Emes*, 106
2. "Thou hast nothing but what thou hast got by cheating and cozening," without averring he was of a trade, not actionable, *Bromesfield v. Snoke*, 307
3. Action by pawnbroker, of whom said, "Thou art a broken fellow," and laid and proved a loss, *Anonymous*, 344
4. Words spoke of a tradesman, that "He is a cheat;" not actionable with-

WORDS NOT INDICTABLE.

1. "The mayor and aldermen of A. are a pack of as great villains as any that rob on the highway;" not indictable, *Rex v. Grandfield*, 98
2. Would not suffer information to be filed for saying of a justice of peace, "He is an old rogue," *Rex v. Lee*, 514

W R I T S.

See DAMAGES.

1. *Capias* made returnable the same day the summons was returnable in error, *Bidolph v. Veal*, 523
2. A person in the Counter for want of bail had a *ne exeat regnum* issued against him; may be brought up by *habeas corpus*, to be charged with an action in *B. R. Nailer's Case*, 562, 563

F I N I S.

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